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JOHN MARSHALL

by

JAMES B. THAYER

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The Riverside Biographical Series

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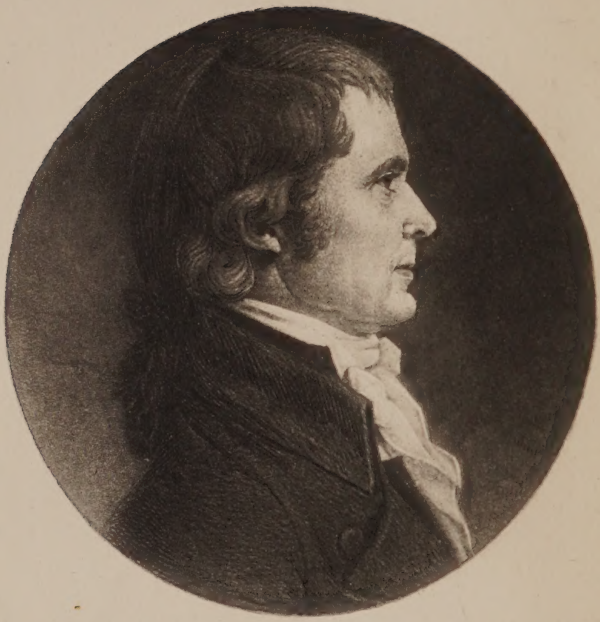

J. Marshall

JOHN MARSHALL

BY

JAMES BRADLEY THAYER

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PREFATORY NOTE

THE writer has drawn with entire freedom from an address delivered by him at Cambridge on February 4, 1901, before the Harvard Law School and the Bar Association of the City of Boston, and from an article on John Marshall in the Atlantic Monthly for March, 1901. J. B. T.

CAMBRIDGE, March 30, 1901.

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The portrait is from a miniature by St. Mémin.

JOHN MARSHALL

CHAPTER I

HIS LIFE BEFORE BECOMING CHIEF JUSTICE; HIS PERSONAL CHARACTERISTICS

In beginning his "Life of Washington," Chief Justice Marshall states that Washington was born in 1732, "near the banks of the Potowmac," in Westmoreland County, Virginia; mentions his employment by Lord Fairfax, the proprietor of the Northern Neck, as surveyor of his estates in the western part of that region; and adds that, in the performance of these duties, "he acquired that information respecting vacant lands, and formed those opinions concerning their future value, which afterwards contributed greatly to the increase of his private fortune."

Thomas Marshall, the father of the Chief Justice, two years older than Washington, was also born in Westmoreland County, was a schoolmate of Washington, served with him both as surveyor of the Fairfax estates, and soon afterwards, as an officer in the French and Indian wars; and he, too, as time passed, found like advantage from his experience as a surveyor.

In 1753, Thomas Marshall was made agent of Lord Fairfax in the management of his estates. In the next year, he married Mary Isham Keith, daughter of a Scotch clergyman, whose wife was a descendant of William Randolph, of Turkey Island, the ancestor of the famous Virginia family of that name. Their son, John Marshall, the oldest of fifteen children, was born on September 24, 1755, in what was afterwards Fauquier County, at a little settlement then known as Germantown, — now Midland, on the Southern Railroad, a few miles south of Manassas. That was the year of Braddock's defeat, and Thomas Marshall, like Washington, was in the service, as an officer.

In Marshall's early childhood, his father's household, situated in a frontier county, must have been agitated with the dreadful rumors, anxieties, and terrors of the troubles with the French and Indians. "So late," he tells us in the "Life of Washington," "as the year 1756, the Blue Ridge was the northwestern frontier; and [Virginia] found immense difficulty in completing a single regiment to protect the inhabitants from the horrors of the scalping-knife, and the still greater horrors of being led into captivity by savages who added terrors to death by the manner of inflicting it." It was not until two years later that the capture of Fort Duquesne relieved Virginia from the frightful ravages that laid waste the region just west of the Blue Ridge.

When John Marshall was ten years old or more, his father left the level country and poor soil of eastern Fauquier, for the higher and more fertile region in the western part of the county, just under the Blue Ridge. At Midland all they can show you now, relating to Marshall, is a small, rude heap

of bricks and rubbish, — what is left of the house where he was born ; and children on the farm reach out to you a handful of the bullets with which that sacred spot and the whole region were thickly sown, before a generation had passed, after his death.

Marshall's education was got from his father, from such teachers as the neighborhood furnished, and, for about a year, at a school in Westmoreland County, where his father and George Washington had attended, and where James Monroe was his own schoolmate. But most he owed to his father, — a man of good stock, of enterprise, experience, strong character and sense, himself of no mean education, — who, personally, took great pains with the training of his children. Marshall admired his father, and declared him to be a far abler man than any of his sons. From him and the teachers provided for him his son got a good knowledge of English history, literature, and poetry, and a fair acquaintance with the classics.

All Marshall's later youth was passed in

the mountain region of Fauquier County, under the Blue Ridge. Judge Story declared that it was to the hardy, athletic habits of his youth among the mountains, operating, we may well conjecture, upon a happy physical inheritance, "that he probably owed that robust and vigorous constitution which carried him almost to the close of his life with the freshness and firmness of manhood."

The house that Marshall's father built at Oakhill is still standing, an unpretending, small, frame building, having connected with it now, as a part of it, another house built by Marshall's son Thomas. At one time the farm comprised an estate of six thousand acres.[1] Since 1865 it has passed out of the hands of the family. It is beautifully placed on high, rolling ground, looking over a great stretch of fertile country, and along the chain of the Blue Ridge, close by. To this

[1] The Chief Justice seems to have inherited and accumulated a considerable estate. By his will he gave to each of his grandsons named John a thousand acres of land. *The Green Bag*, viii. 4. He also had been a surveyor. *Ib.* 480.

region, where his children and kindred lived, about a hundred miles from Richmond, Marshall delighted to resort in the summer, all his life long. In the autumn of 1807, after the Burr trial, he writes to a friend, "The day after the commitment of Colonel Burr for a misdemeanor, I galloped to the mountains." "I am on the wing," he tells Judge Story in 1828, "for my friends in the upper country, where I shall find rest and dear friends, occupied more with their farms than with party politics."

When Marshall was about eighteen years old he began to study Blackstone; but he quickly dropped it, for the troubles with Great Britain thickened, and, like his neighbors, he prepared for fighting.

He seems to have found a copy of Blackstone in his father's house, as he had found there much other sterling English literature. It was then a new book, but already famous. Published in England in 1765–69, a thousand copies had been taken in this country;[1] and just now the first American edition was

[1] Hammond's Blackstone, vol. i., pp. viii. xxv.

out (Philadelphia, 1771–72), in which the list of subscribers, headed by the name of "John Adams, barrister at law, Boston," had also that of "Captain Thomas Marshall, Clerk of Dunmore County." Dunmore County, now Shenandoah, was then a very new county, just over the Blue Ridge from Fauquier; and it is believed that there was but one Captain Thomas Marshall in those parts.

The earliest personal description of Marshall that we have belongs to this period. It is preserved in Horace Binney's admirable address at Philadelphia, after Marshall's death. He gives it from the pen of an eye-witness, a "venerable kinsman" of Marshall. News had come, in May, 1775, of the fighting at Concord and Lexington. The account shows us the youth, as lieutenant, drilling a company of soldiers in Fauquier County: —

"He was about six feet high, straight, and rather slender, of dark complexion, showing little if any rosy red, yet good health, the outline of the face nearly a cir-

cle, and within that, eyes dark to blackness,[1] strong and penetrating, beaming with intelligence and good nature; an upright forehead, rather low, was terminated in a horizontal line by a mass of raven-black hair, of unusual thickness and strength. The features of the face were in harmony with this outline, and the temples fully developed. The result of this combination was interesting and very agreeable. The body and limbs indicated agility rather than strength, in which, however, he was by no means deficient. He wore a purple or pale blue hunting-shirt, and trousers of the same material fringed with white. A round black hat, mounted with the buck's tail for a cockade, crowned the figure and the man. He went through the manual exercise by word and motion, deliberately pronounced and performed in the presence of the company, before he required the men to imitate him; and then proceeded to exercise them with the most perfect temper. . . .

[1] Marshall's eyes are often spoken of as black. In fact, they were brown.

"After a few lessons the company were dismissed, and informed that if they wished to hear more about the war, and would form a circle about him, he would tell them what he understood about it. The circle was formed, and he addressed the company for something like an hour. He then challenged an acquaintance to a game of quoits, and they closed the day with foot-races and other athletic exercises, at which there was no betting."

"This," adds Mr. Binney, "is a portrait, to which in simplicity, gayety of heart, and manliness of spirit, in everything but the symbols of the youthful soldier, and one or two of those lineaments which the hand of time, however gentle, changes and perhaps improves, he never lost his resemblance."

Marshall accompanied his father to the war as a lieutenant, and in a year or two became a captain. In leaving the father here, it may be said that three of his sons were with him in the war, and that he himself served with gallantry and distinction as a colonel. In 1780, he was at the South

with General Lincoln, and being included in the surrender of that officer and on parole, visited Kentucky, not yet a State. After a few years he removed there with the younger part of his family, leaving Oakhill, as it seems, in the hands of his son John. He died in Kentucky in 1806, having survived to witness the successive honors of his son culminate in his becoming Chief Justice of the United States.[1]

[1] It may be added that Thomas Marshall, father of the Chief Justice, was the son of John Marshall, called "of the Forest," from the name of his place in Westmoreland County. Of this John it is said, in a little autobiography of the Chief Justice of some five hundred words, preserved in Mr. Justice Gray's valuable oration at Richmond, on February 4, 1901, that his "parents migrated from Wales and settled in the county of Westmoreland in Virginia." The will of "Thomas Marshall, carpenter," proved May 31, 1704, describing himself as of Westmoreland County, is printed in the *Virginia Magazine of History*, ii. 343, 344; and it is there stated in a note that this Thomas "was the first of his race in America." On the other hand, we are told by an intelligent writer in Appleton's *Cyclopædia of American Biography*, and elsewhere, that the father of "John of the Forest" was Thomas, born in Virginia in 1655, who died in 1704; and that it was his father, John, a captain of cavalry in the service of Charles I., who emigrated to Virginia about 1650.

It was in the autumn of 1775 that Marshall, as lieutenant in a regiment of minutemen, of which his father was major, marched down through the country to the seaboard to resist Lord Dunmore's aggressions. They were clothed, we are told, in green homespun hunting-shirts, having the words "Liberty or Death" in large letters on the breast, with bucks' tails in their hats, and tomahawks and scalping-knives in their belts. The enemy at Norfolk feared, it is said, for their scalps, but they lost none.[1]

He was thus in the first fighting in Virginia, in the fall of 1775, at Norfolk; afterwards he served in New Jersey, Pennsylvania, and New York; and again in Virginia toward the end of the war. He was at Valley Forge, in the fighting at the Brandywine, Germantown, Monmouth, Stony Point, and Paulus Hook, between 1776 and 1779. He served often as judge advocate, and in this way was brought into personal relations with Washington and Hamilton. A fellow officer and messmate describes him,

[1] Flanders, *Lives of the Chief Justices*, ii. 291.

during the dreadful winter at Valley Forge, as neither discouraged nor disturbed by anything, content with whatever turned up, and cheering everybody by his exuberance of spirits and "his inexhaustible fund of anecdote." He was "idolized by the soldiers and his brother officers."

President Quincy gives us a glimpse of him at this period, as he heard him described at a dinner with John Randolph and a large company of Virginians and other Southern gentlemen. They were talking of Marshall's early life and his athletic powers. "It was said in them that he surpassed any man in the army; that when the soldiers were idle at their quarters, it was usual for the officers to engage in matches of quoits, or in jumping and racing; that he would throw a quoit farther, and beat at a race any other; that he was the only man who, with a running jump, could clear a stick laid on the heads of two men as tall as himself. On one occasion he ran in his stocking feet with a comrade. His mother, in knitting his stockings, had the legs of blue yarn and the

heels of white. This circumstance, combined with his uniform success in the race, led the soldiers, who were always present at these races, to give him the sobriquet of 'Silver-Heels,' the name by which he was generally known among them."

Toward the end of 1779, owing to the disbanding of Virginia troops at the end of their term of service, he was left without a command, and went to Virginia to await the action of the legislature as to raising new troops. It was a fortunate visit; for at Yorktown he met the young girl who, two or three years later, was to become his wife; and he was also able to improve his leisure by attending, for a few months in the early part of 1780, two courses of lectures at the college, on law and natural philosophy. This was all of college or university that he ever saw; but later, from several of them, he received their highest honors. In 1802 the college of New Jersey (Princeton, where his oldest son, Thomas, was to graduate in 1803), in 1806, Harvard, and in 1815, the University of Pennsylvania, made him

doctor of laws.[1] Marshall's opportunity for studying law, under George Wythe, at William and Mary College, seems to have been owing to a change in the curriculum, made, just at that time, at the instance of Jefferson, governor of the State, and, in that capacity, visitor of the college. The chair of divinity had just been abolished, and one of law and police, and another of medicine, were substituted. On December 29, 1779, the faculty voted that, "for the encouragement of science, a student, on paying annually 1000 pounds of tobacco, shall be entitled to attend any school of the following professors, viz.: of Law and Police; of Natural Philosophy and Mathematics," etc. Marshall chose the two courses above named; he must have been one of the very first to avail himself of this new privilege. He remained only one term. In view of what was to happen by and by, it is interesting to observe that this opportunity for education in law came through the agency of Thomas Jefferson.

[1] His youngest son, Edward Carrington Marshall, graduated at Harvard in 1826.

The records of the Phi Beta Kappa Society at William and Mary College, where that now famous society had originated less than a year and a half before, show that on the 18th of May, 1780, "Captain John Marshall, being recommended as a gentleman who would make a worthy member of the society, was balloted for and received;" and three days later he was appointed, with others, "to declaim the question whether any form of government is more favorable to public virtue than a Commonwealth." Bushrod Washington and other well-known names are found among his associates in this chapter, which has been well called "an admirable nursery of patriots and statesmen."

It was in the summer of 1780 that Marshall was licensed to practice law.

During this visit to Virginia, as I have said, he met the beautiful little lady, fourteen years old, who became his wife at the age of sixteen, was to be the mother of his ten children,[1] and was to receive from him

[1] Only six of his children grew to full age. See his

the most entire devotion until the day of her death in 1831. Some letters of her older sister, Mrs. Carrington, written to another sister, have lately been printed, which give us a glimpse of Captain Marshall in his twenty-fifth year. These ladies were the daughters of Jaquelin Ambler, formerly collector of customs at Yorktown, and then treasurer of the colony, and living in that town, next door to the family of Colonel Marshall. Their mother was that Rebecca Burwell, for whom, under the name of "Belinda," Jefferson had languished, in his youthful correspondence of some twenty years before. The girls had often heard the captain's letters to his family, and had the highest expectations when they learned that he was coming home from the war. They were to meet him first at a ball, and were contending for the prize beforehand. Mary, the youngest, carried it off. "At the first introduction," writes her sister, who was but

touching letter to Judge Story of June 26, 1831: "You ask me if Mrs. Marshall and myself have ever lost a child. We have lost four," etc. — *Proceedings of the Mass. Hist. Soc.* (2d series) xiii. 345.

one year older, "he became devoted to her." "For my own part," she adds, "I felt not the smallest wish to contest the prize with her. . . . She, with a glance, divined his character, . . while I, expecting an Adonis, lost all desire of becoming agreeable in his eyes when I beheld his awkward, unpolished manner and total negligence of person." "How trivial now seem all such objections!" she exclaims, writing in 1810, and going on to speak with the utmost admiration of his relations to herself and all her family, and above all, to his wife. "His exemplary tenderness to our unfortunate sister is without parallel. With a delicacy of frame and feeling that baffles all description, she became, early after her marriage, a prey to extreme nervous affection, which, more or less, has embittered her comfort through her whole life; but this has only seemed to increase his care and tenderness, and he is, as you know, as entirely devoted as at the moment of their first being married. Always and under every circumstance an enthusiast in love, I have very lately heard

him declare that he looked with astonishment at the present race of lovers, so totally unlike what he had been himself. His never-failing cheerfulness and good humor are a perpetual source of delight to all connected with him, and, I have not a doubt, have been the means of prolonging the life of her he is so tenderly devoted to."

"He was her devoted lover to the very end of her life," another member of his family connection has said. And Judge Story, in speaking of him after his wife's death, described him as "the most extraordinary man I ever saw for the depth and tenderness of his feelings."

A little touch of his manner to his wife is seen in a letter, which is in print, written to her from the city of Washington, on February 23, 1825, in his seventieth year. He had received an injury to his knee, about which Mrs. Marshall was anxious. "I shall be out," he writes, "in a few days. All the ladies of the secretaries have been to see me, some more than once, and have brought me more jelly than I could eat, and

many other things. I thank them, and stick to my barley broth. Still I have lots of time on my hands. How do you think I beguile it? I am almost tempted to leave you to guess, until I write again. You must know that I begin with the ball at York, our splendid assembly at the Palace in Williamsburg, my visit to Richmond for a fortnight, my return to the field, and the very welcome reception you gave me on my arrival at Dover, our little tiffs and makings-up, my feelings when Major Dick[1] was courting you, my trip to the Cottage [the Ambler home in Hanover County, where the marriage took place],[2] — the thousand little incidents, deeply affecting, in turn."

This "ball at York" was the one of which Mrs. Carrington wrote; and of the "assembly at the Palace" she also gave an account, remarking that "Marshall was devoted to my sister."

Miss Martineau, who saw him the year

[1] Richard Anderson, father of Robert Anderson, the hero of Fort Sumter. See Marion Harland's *Old Colonial Homesteads*, 97.

[2] But see Mrs. Hardy, in *The Green Bag*, viii. 482.

before he died, speaks with great emphasis of what she calls his "reverence" and his affectionate respect for women. There were many signs of this all through his life. Even in the grave and too monotonous course of his "Life of Washington," one comes now and then upon a little gleam of this sort, that lights up the page; as when he speaks of Washington's engagement to Mrs. Custis, a lady "who to a large fortune and a fine person added those amiable accomplishments which . . . fill with silent but unceasing felicity the quiet scenes of private life." When he is returning from France, in 1798, he writes gayly back from Bordeaux to the Secretary of Legation at Paris: "Present me to my friends in Paris; and have the goodness to say to Madame Vilette, in my name and in the handsomest manner, everything which respectful friendship can dictate. When you have done that, you will have rendered not quite half justice to my sentiments." "He was a man," said Judge Story, "of deep sensibility and tenderness; . . . whatever may be his fame in the eyes

of the world, that which, in a just sense, was his brightest glory was the purity, affectionateness, liberality, and devotedness of his domestic life."

Marshall left the army in 1781, when most of the fighting in Virginia was over; and began practice in Fauquier County when the courts were opened, after Cornwallis's surrender, in October of that year.

Among his neighbors he was always a favorite. In the spring of 1782 he was elected to the Assembly, and in the autumn to the important office of member of the "Privy Council, or Council of State," consisting of eight persons chosen by joint ballot of the two houses of the Assembly. "Young Mr. Marshall," wrote Edmund Pendleton, presiding judge of the Court of Appeals, to Madison, in November of that year, "is elected a councilor. . . . He is clever, but I think too young for that department, which he should rather have earned, as a retirement and reward, by ten or twelve years of hard service." But, whether young or old, the people were for-

ever forcing him into public life. Eight times he was sent to the Assembly; in 1788 to the Federal Convention of Virginia, and in 1798 to Congress.

Unwelcome as it was to him, almost always, to have his brilliant and congenial place and prospects at the bar thus interfered with, we can see now what an admirable preparation all this was for the great station, which, a little later, to the endless benefit of his country, he was destined to fill. What drove him into office so often was, in a great degree, that delightful and remarkable combination of qualities which made everybody love and trust him, even his political adversaries, so that he could be chosen when no one else of his party was available. In this way, happily for his country, he was led to consider, early and deeply, those difficult problems of government that distressed the country in the dark period after the close of the war, and during the first dozen years of the Federal Constitution.

As regards the effect of his earlier experi-

ence in enlarging the circle of a patriot's thoughts and affections, he himself has said: "I am disposed to ascribe my devotion to the Union, and to a government competent to its preservation, at least as much to casual circumstances as to judgment. I had grown up at a time . . . when the maxim, 'United we stand, divided we fall,' was the maxim of every orthodox American; and I had imbibed these sentiments so thoroughly that they constituted a part of my being. I carried them with me into the army, where I found myself associated with brave men from different States who were risking life and everything valuable in a common cause; . . . and where I was confirmed in the habit of considering America as my country and Congress as my government." It was this confirmed "habit of considering America as my country," communicated by him to his countrymen, which enabled them to carry through the great struggle of forty years ago, and to save for us all, North and South, the inestimable treasure of the Union.

After Marshall's marriage, in January,

1783, he made Richmond his home for the rest of his life. It was still a little town, but it had lately become the capital of the State, and the strongest men at the bar gradually gathered there. Marshall met them all. One has only to look at the law reports of Call and Washington to see the place that he won. He is found in most of the important cases. In his time no man's name occurs oftener, probably none so often.

The earliest case in which the printed reports show his name is that of Hite *v.* Fairfax (4 Call's Reports, 42), in May, 1786, and his argument seems to be fully reported. It was a very important case, and Marshall represented tenants of Lord Fairfax. There were conflicting grants on the famous "Northern Neck" of Virginia, an extensive region given by the crown to Lord Fairfax's ancestor, whose boundaries had been in dispute. It comprised the land between the Potomac and the Rappahannock, "within the heads of the rivers . . . the courses of the said rivers, as they are commonly called or known by the inhabitants and descriptions of those

parts, and Chesapeake Bay, together with the rivers themselves and all the islands within the banks of the rivers." This description was finally admitted by the crown (in 1745) to include all the land between the head springs of the Potomac and those of the south branch of the Rappahannock. Bishop Meade[1] describes it as the region which, beginning on the Chesapeake Bay, lies between the Potomac and Rappahannock rivers, and crossing the Blue Ridge, or passing through it with the Potomac at Harper's Ferry, extends with that river to the heads thereof in the Alleghany Mountains, and thence by a straight line crosses the North Mountain and Blue Ridge at the headwaters of the Rappahannock, . . . the most fertile part of Virginia."

Marshall had now to meet a total denial of Lord Fairfax's title. His argument of ten or twelve pages shows already the characteristics, the cogency, clear method, and neat precision of thought and speech, by which his later work was marked. "I had

[1] *Old Churches and Families of Virginia*, ii. 105.

conceived," he says, "that it was not more certain that there was such a tract of country as the Northern Neck than that Lord Fairfax was the proprietor of it. . . . Gentlemen cannot suppose that a grant made by the crown to the ancestor for services rendered or even for affection can be invalidated in the hands of an heir because these services and affections are forgotten, or because the thing granted has, from causes which must have been foreseen, become more valuable than when it was given. And if it could not be invalidated in the hands of the heir, much less can it be in the hands of the purchaser." As regards the construction of the grant: "Whether Lord Fairfax's grant extended originally beyond the forks of the rivers or not, will no more admit of argument than it ever could have admitted of a doubt. But whether it should be bounded by the north or south fork of the Rappahannock was a question involved in more uncertainty. . . . It is, however, no longer a question, for it has been decided. . . . That decision did not create or extend

Lord Fairfax's right, but determined what the right originally was. The bounds of many patents are doubtful; the extent of many titles uncertain: but when a decision is once made on them, it removes the doubt and ascertains what the original boundaries were." In reference to a personal appeal in behalf of certain settlers, he says, "Those who explore and settle new countries are generally bold, hardy, and adventurous men, whose minds as well as bodies are fitted to encounter danger and fatigue; their object is the acquisition of property, and they generally succeed. None will say that the complainants have failed; and if their hardships and dangers have any weight in the court, the defendants share in them, and have equal claim to countenance; for they, too, with humbler views and less extensive prospects, have explored, bled for, and settled a till then uncultivated desert."

Compare with this the like simple felicity and exactness of expression in his last reported utterance in court, when he was closing his great career as Chief Justice of the

United States, forty-nine years later. He is refusing a motion for delay: "The court has taken into its serious and anxious consideration the motion made on the part of the government to continue the cause of Mitchel *v.* The United States to the next term. Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different media that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment guided by its own reason. . . . The opinion of the court will be delivered."[1]

[1] It was given by another judge.

At first, he had brought from the army, and from his home on the frontier, simple and rustic ways which surprised some persons at Richmond, whose conception of greatness was associated with very different models of dress and behavior. "He was one morning strolling," we are told, "through the streets of Richmond, attired in a plain linen roundabout and shorts, with his hat under his arm, from which he was eating cherries, when he stopped in the porch of the Eagle Hotel, indulged in a little pleasantry with the landlord, and then passed on." A gentleman from the country was present, who had a case coming on before the Court of Appeals, and was referred by the landlord to Marshall as the best lawyer to employ. But "the careless, languid air" of Marshall had so prejudiced the man that he refused to employ him. The clerk, when this client entered the court-room, also recommended Marshall, but the other would have none of him. A venerable-looking lawyer, with powdered wig and in black cloth, soon entered, and the gentleman en-

gaged him. In the first case that came up, this man and Marshall spoke on opposite sides. The gentleman listened, saw his mistake, and secured Marshall at once; frankly telling him the whole story, and adding that while he had come with one hundred dollars to pay his lawyer, he had but five dollars left. Marshall good-naturedly took this, and helped in the case. In the Virginia Federal Convention of 1788, at the age of thirty-three, he is described, rising after Monroe had spoken, as "a tall young man, slovenly dressed in loose summer apparel. . . . His manners, like those of Monroe, were in strange contrast with those of Edmund Randolph or of Grayson."

In such stories as these, one is reminded, as he is often reminded, of a resemblance between Marshall and Lincoln. Very different men they were, but both thorough Americans, with unborrowed character and manners, and a lifelong flavor derived from no other soil.

At the height of Marshall's reputation, in 1797, a French writer, who had visited Rich-

mond lately, in speaking of Edmund Randolph, says, "He has a great practice, and stands, in that respect, nearly on a par with Mr. J. Marshall, the most esteemed and celebrated counselor of this town." He mentions Marshall's annual income as being four or five thousand dollars. "Even by his friends," it is added, "he is taxed with some little propensity to indolence, but he nevertheless displays great superiority when he applies his mind to business." Another contemporary, who praises his force and eloquence in speaking, yet says: "It is difficult to rouse his faculties. He begins with reluctance, hesitation, and vacancy of eye. . . . He reminds one of some great bird, which flounders on the earth for a while before it acquires impetus to sustain its soaring flight." And finally, William Wirt, who was seventeen years Marshall's junior, and came to the bar in 1792, when Marshall was nearly at the head of it, writing anonymously in 1804, describes him as one, "who, without the advantage of person, voice, attitude, gesture, or any of the ornaments of an

orator, deserves to be considered as one of the most eloquent men in the world." He attributes to him "one original and almost supernatural faculty, . . . of developing a subject by a single glance of his mind. . . . His eyes do not fly over a landscape and take in its various objects with more promptitude and facility than his mind embraces and analyzes the most complex subject. . . . All his eloquence consists in the apparently deep self-conviction and the emphatic earnestness and energy of his style, the close and logical connection of his thoughts, and the easy gradations by which he opens his lights on the attentive minds of his hearers."

In 1789 he declined the office of District Attorney of the United States at Richmond,[1] in 1795 that of Attorney-General of the United States, and in 1796 that of Minister to France, all offered him by Washington. When President Adams persuaded him, in 1797, to go, with Pinckney and Gerry, as

[1] Mr. Justice Gray preserves this fact in his address on Marshall. His commission bore the same date with that of Chief Justice Jay, September 26, 1789, — two days after the approval of the Judiciary Act.

envoy to France, he wrote to Gerry of "General Marshall" (as he was then called, from his rank of brigadier general, since 1793, in the Virginia militia), "He is a plain man, very sensible, cautious, guarded, and learned in the law of nations." The extraordinary details of that unsuccessful six months' attempt to come to terms with France are found in Marshall's very able dispatches and in the diary which he kept;[1] for, with the instinct of a man of affairs, he failed not to remember, with Thomas Gray, that "a note is worth a cartload of recollections." His own part in the business was marked by great moderation and ability; and on his return, in 1798, he was received at Philadelphia with remarkable demonstrations and the utmost enthusiasm. A correspondent of Rufus King, writing from New York in July of that year, says, "No two men can be more beloved and honored than Pinckney and Marshall;" and again in November: "Saving General Washington, I believe the President, Pinckney, and Mar-

[1] See Wait's *State Papers*, iii. 165–304.

shall are the most popular characters now in our country. There is a certain something in the correspondence of Pinckney and Marshall . . . that has united all heads and hearts in their eulogy." It is understood that the American side of this correspondence was by Marshall. Gerry had allowed himself in a measure to be detached by the Directory from his associates, to their great displeasure. With them, in important respects, he disagreed.

Among those who paid their respects to Marshall, on his return from France, was Thomas Jefferson, the Vice-President, whose correspondence shows him at the time expressing the most unflattering opinion of the envoys. Jefferson wrote to Marshall the following note: "In after years," says Mrs. Hardy, one of Marshall's descendants,[1] "the Chief Justice frequently laughed over it, saying, 'Mr. Jefferson came very near telling me the truth; the added *un* to *lucky*, policy alone demanded.'" The note ran thus: "Thos. Jefferson presents his compli-

[1] *The Green Bag*, viii. 482.

ments to General Marshall. He had the honor of calling at his lodgings twice this morning, but was so unlucky as to find that he was out on both occasions. He wished to have expressed in person his regret that a pre-engagement for to-day, which could not be dispensed with, would prevent him the satisfaction of dining in company with Genl. Marshall, and, therefore, begs leave to place here the expressions of that respect which in company with his fellow-citizens he bears him.

"Genl. Marshall,
at Oeller's Hotel, June 23d, 1798."

In 1798 Adams offered to Marshall the seat on the Supreme Bench, made vacant by the death of James Wilson. He declined it; and it went to his old associate at William and Mary College, Bushrod Washington. Marshall did yield, however, to General Washington's urgent request to stand for Congress that year. He held out long against Washington's arguments, and only yielded, at last, when that venerated man called attention to his own recent sacrifice in accepting the unwelcome place of lieu-

tenant-general of the army. When that went into the scale it was too much. Marshall was then on a visit to Mount Vernon, whither he had been invited in August or September, in company with Washington's nephew, the coming judge.

On their way to Mount Vernon, the two travelers met with a misadventure which gave great amusement to Washington, and of which he enjoyed telling his friends. They came on horseback, and carried but one pair of saddlebags, each using one side. Arriving thoroughly drenched by rain, they were shown to a chamber to change their garments. One opened his side of the bags and drew forth a black bottle of whiskey. He insisted that he had opened his companion's repository. Unlocking the other side, they found a big twist of tobacco, some corn bread, and the equipment of a pack-saddle. They had exchanged saddlebags with some traveler, and now had to appear in a ludicrous misfit of borrowed clothes.[1]

[1] Paulding's *Life of Washington*, ii. 191; *Lippincott's Magazine*, ii. 624, 625.

The election of Marshall to Congress excited great interest.[1] Washington heartily rejoiced in it. Jefferson, on the other hand, remarked that while Marshall might trouble the Republicans somewhat, yet he would now be unmasked. He had been popular with the mass of the people, Jefferson said, from his "lax, lounging manners," and with wiser men through a "profound hypocrisy." But now his British principles would stand revealed.

The New England Federalists were very curious about him; they had been alarmed and outraged, during the campaign, by his expressing opposition to the alien and sedition laws; but they were much impressed by him. Theodore Sedgwick wrote to Rufus

[1] In an amusing account of this election (Munford's *The Two Parsons*), we are told that the sheriff presided, with the two candidates, Marshall and John Clopton, seated on the justice's bench. The voter, being asked for whom he voted, gave the name of his candidate; and the latter thanked him; *e. g.*, "Your vote is appreciated, sir," said Marshall to his friend Parson Blair. For an account of the same method of conducting elections in Virginia at a later period, see John S. Wise's *The End of an Era*.

King that he had "great powers, and much dexterity in the application of them. . . . We can do nothing without him." But Sedgwick wished that "his education had been on the other side of the Delaware." George Cabot wrote to King: "General Marshall is a leader. . . . But you see in him the faults of a Virginian. . . . He thinks too much of that State, and he expects that the world will be governed by rules of logic." But Cabot hopes to see him improve, and adds, "He seems calculated to act a great part." In the end, the Northern Federalists were disappointed in finding him too moderate. He held the place of leader of the House, and passed into the cabinet in May, 1800. On January 31, 1801, he was commissioned as Chief Justice.

CHAPTER II

ARGUMENTS AND SPEECHES; LIFE OF WASHINGTON; RELATIONS WITH JEFFERSON

THERE is little room for quotations from Marshall's speeches or dispatches.

Some reference has already been made to his earliest reported argument in court, in 1786. In the Virginia Federal Convention, in 1788, Marshall's principal speeches related to the subjects of taxation, the militia, and the judiciary. These, so far as preserved, are found in the third volume of Elliot's Debates, and in Dr. Grigsby's very interesting History of that Convention, in the tenth volume of the "Virginia Historical Collections." Nothing remains of a famous speech in support of Jay's treaty, at a public meeting in Richmond in 1795. A summary of his strong but unsuccessful argument in 1796, in the case of Ware *v.* Hylton (3 Dallas 199), as to the claims of British

creditors, his only case before the Supreme Court of the United States, is preserved in the volume of reports. This argument attracted much attention among the statesmen at Philadelphia. "I then became acquainted," he wrote to a friend, "with Mr. Cabot, Mr. Ames, Mr. Dexter, and Mr. Sedgwick of Massachusetts, Mr. Wadsworth of Connecticut, and Mr. King of New York. . . . I was particularly intimate with Mr. Ames."

After Washington's death in 1799, Marshall, in a short and well-known speech, moved the resolution of the House of Representatives.

A little afterwards he made a great and admirably thorough address in a matter which then deeply affected the public mind; from this, his greatest public speech,[1] a quotation is given below. It was made March 4, 1800,

[1] "The masterly and conclusive argument of John Marshall in the House of Representatives. 8 Stat. 129; Wharton's State Trials, 392; Bee [Reports], 286; 5 Wheat. appendix 3." — Gray, J., speaking for the Supreme Court of the United States, in Fong Yue Ting *v.* U. S., 149 U. S. 698, 714. This speech is also found in Moore's *American Eloquence*, ii. 7.

in defense of the President's action in the case of Thomas Nash, *alias* Jonathan Robbins. This person, a British subject, but claiming to be an American citizen, and to have been impressed into the British navy, was charged with piracy and murder on board a British ship of war in 1791. Being found in Charleston, S. C., he was arrested in 1799, at the instance of the British consul, and held to await an application for his extradition under article 27 of the treaty with Great Britain of 1795. That article bound the two countries reciprocally to deliver up, on request of the other, persons charged with murder committed within the jurisdiction of that other. Evidence of criminality was first to be furnished, such as would justify commitment for trial on the same charge in the country where the accused was found.

An application for extradition was made to the federal authorities in Charleston, but at their suggestion this was transferred to the President, through the Secretary of State. The Secretary informed Bee, the

United States District Judge, of the President's "advice and request" that Nash should be delivered up, at the same time referring to the clause in the treaty as to the necessary evidence of criminality.[1] The judge on July 1, 1799, informed the Secretary that he had notified the British consul that on the production of such evidence, the prisoner would be delivered up when the consul was ready to receive him. The delivery was made; and on September 9 of the same year, the British admiral was able to inform the British Minister that Nash "has been tried at a court martial, and sentenced to suffer death, and afterwards hung in chains; which sentence has been put into execution."

These events were used with great effect by the political opponents of the administration. When Congress met, the President was called upon by the House of Repre-

[1] The President had written to the Secretary of State from Quincy, May 21, 1799: "How far the President of the United States would be justified in directing the judge to deliver up the offender is not clear. I have no objection to advise, and request him to do so." Wharton's State Trials, 418.

sentatives for the papers relating to them; and when they were sent in, Edward Livingston, of New York, submitted resolutions condemning the action of the executive, on the ground that the determination of the questions involved in the case "are all matters exclusively for judicial inquiry;" that the acts of the President "are a dangerous interference of the executive with judicial decisions;" and that the compliance of the district judge "is a sacrifice of the constitutional independence of the judicial power." After a full debate, these resolutions were negatived by a decided vote. Marshall's very able argument vindicated the action taken, and laid down principles which have ever since governed the course of the government in such cases.

The following passages will afford a specimen of the style and method of this address, a style and method which were characteristic of all Marshall's work: —

"The same argument applies to the observations on the seventh article of the amendment to the Constitution. That arti-

cle relates only to trials in the courts of the United States, and not to the performance of a contract for the delivery of a murderer not triable in those courts.

"In this part of the argument, the gentleman from New York [Mr. Livingston] has presented a dilemma, of a very wonderful structure indeed. He says that the offense of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed; if it was not a crime, he ought not to have been delivered up to a foreign government, where his punishment was inevitable.

"It has escaped the observation of that gentleman that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the Constitution or triable in the courts of the United States; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma, the gentleman from New York is himself perfectly at liberty to retain either form.

"He has chosen to consider it as a crime, and says it has been made a crime by treaty, and is punished by sending the offender out of the country. The gentleman is incorrect in every part of his statement. Murder on board a British frigate is not a crime created by treaty. It would have been a crime of precisely the same magnitude had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of the unfortunate criminal, who was hung and gibbeted, evinced to him that the punishment of his crime was of a much more serious nature than mere banishment from the United States.

"The gentleman from Pennsylvania [Mr. Gallatin] and the gentleman from Virginia [Mr. Nicholas] have both contended that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination. The points of law which must have been decided are stated by the gentleman from Pennsylvania to be, first, a question whether the offense was committed

within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

"It is true, sir, these points of law must have occurred, and must have been decided, but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled by the misrepresentations of the Constitution made in the resolutions of the gentleman from New York; and, in consequence of being so misled, his observations have the appearance of endeavoring to fit the Constitution to his arguments, instead of adapting his arguments to the Constitution.

"When the gentleman has proved that these are questions of law, and that they

must have been decided by the President, he has not advanced a single step towards proving that they were improper for executive decision. The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government is bound to restore them, if in its power, were questions of law, but they were questions of political law, proper to be decided, and they were decided by the executive, and not by the courts. The *casus fœderis* of the guaranty was a question of law, but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *casus fœderis*, under the twenty-seventh article of the treaty with Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts. If murder should be committed

within the United States, and the murderer should seek an asylum in Britain, the question whether the *casus fœderis*, of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

"When, therefore, the gentleman from Pennsylvania has established that, in delivering up Thomas Nash, points of law were decided by the President, he has established a position which in no degree whatever aids his argument. The case is in its nature a national demand, made upon the nation. The parties are the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance. The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. . . .

"The treaty, which is a law, enjoins the

performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this is done, it seems the duty of the executive department to execute the contract by any means it possesses.

"The gentleman from Pennsylvania contends that, although this should be properly an executive duty, yet it cannot be performed until Congress shall direct the mode of performance. . . . The treaty stipulating that a murderer shall be delivered up to justice is as obligatory as an act of Congress making the same declaration. If, then,

there was an act of Congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the United States, should be delivered up by the United States, on the demand of his Britannic Majesty and such evidence of his criminality as would have justified his commitment for trial, had the offense been committed here; could the President, who is bound to execute the laws, have justified the refusal to deliver up the criminal by saying that the legislature had totally omitted to provide for the case?

"The executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided. . . . If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to

understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union?"

This clear, strong, convincing speech, of which I have quoted but a small portion, settled the question then in dispute, and the principles here laid down have controlled the action of the government ever since.

Very soon after entering upon his duties as Chief Justice, Marshall undertook to write the "Life of Washington." This gave him a great deal of trouble and mortification. It proved to be an immense labor; the publishers were importunate, and he was driven into print before he was ready. The result was a work in five volumes, appearing from 1802 to 1804, full of the most valuable and authentic material, well repaying perusal, yet put together with singular lack of literary skill, and in many ways a great disappointment.[1] In the later years of his life,

[1] The short "autobiography" before referred to (*ante*, p. 10, n.) ends thus: "I have written no book except

he revised it, corrected some errors, shortened it, and published it in three volumes: one of them, in 1824, as a separate preliminary history of the colonial period, and the other two, in 1834, as the "Life of Washington." This work, in its original form, gave great offense to Jefferson, written, as it was, from the point of view of a constant admirer and supporter of the policy of Washington; a "five volume libel," Jefferson called it.

Jefferson had ludicrous misconceptions as to Marshall's real character. It is said that after Burr's trial, in 1807, all personal intercourse between them ceased.[1] Referring in 1810 to the "batture" case, in which Edward Livingston sued him, and which was to come before Marshall, Jefferson says that he is certain what the result of the case should be, but nobody can tell what it will be; for "the Judge's mind [is] of that gloomy malignity which will never let him forego the opportunity of satiating it upon a

the 'Life of Washington,' which was executed with so much precipitation as to require much correction."

[1] Van Santvoord, *Lives of the Chief Justices*, 343, n.

victim. . . . And to whom is my appeal? From the judge in Burr's case to himself and his associate justices in Marbury *v.* Madison. Not exactly, however. I observe old Cushing is dead. [Judge Cushing had died a fortnight before.] At length, then, we have a chance of getting a Republican majority in the Supreme Judiciary." And he goes on to express his confidence in the "appointment of a decided Republican, with nothing equivocal about him."

Who was this decided and unequivocal Republican to be? Jefferson was anxious about it, and wrote to Madison, suggesting Judge Tyler, of Virginia, as a candidate, and reminding the President of Marshall's "rancorous hostility to his country." Who was it, in fact, that was appointed? Who but Joseph Story! — a Republican, indeed, but one whom Jefferson, in this very year, was designating as a "pseudo-Republican," and who soon became Marshall's warmest admirer and most faithful supporter.

CHAPTER III

THE BEGINNINGS OF THE CHIEF JUSTICE'S CAREER; AMERICAN CONSTITUTIONAL LAW; MARBURY *v.* MADISON.

MARSHALL'S accession to the bench was marked by an impressive circumstance. For ten years or more, he alone gave all the opinions of the court to which any name was attached, except where the case came up from his own circuit, or, for any reason, he did not sit. In the very few cases where opinions were given by the other justices, it was in the old way, *seriatim*, — the method followed before Marshall came in, as it was also the method of contemporary English courts.

Whatever may have been the purpose of the Chief Justice in introducing this usage, there can be no doubt as to the impression it was calculated to produce. It seemed, all of a sudden, to give to the judicial depart-

ment a unity like that of the executive, to concentrate the whole force of that department in its chief, and to reduce the side-justices to a sort of cabinet advisers. In the very few early cases where there was expressed dissent, it lost much of its impressiveness, when announced, as it sometimes was, by the mouth that gave the opinion of the court.

In 1812, when a change took place, the court had been for a year without a quorum. Moreover, Judge Story had just come to the bench, a man of quite too exuberant an intellect and temperament to work well as a silent side-judge. We remark, also, at the beginning of that term, that the Chief Justice was not in attendance, having, as the reporter tells us, "received an injury by the oversetting of the stage-coach on his journey from Richmond." And it may be added that just at this time the anxious prayer of Jefferson was answered, and a majority of the judges were Republicans. From whatever cause, henceforward there was a change; and without returning to the old

habit of *seriatim* opinions, the side-judges had their turn, as they do now.

In most of Marshall's opinions, one observes the style and special touch of a thoughtful and original mind; in some of them the powers of a great mind, in full activity. His cases relating to international law, as I am assured by those competent to judge, rank with the best there are in the books. As regards most of the more familiar titles of the law, it would be too much to claim for him the very first rank. In that region he is, in many respects, equaled or surpassed by men more deeply versed in the learning and technicalities of the law, in what constitutes that "artificial perfection of reason" which Coke used to glorify as far transcending any man's natural reason, — men such as Story, Kent, or Shaw, or even the reformer, Mansfield, whom he greatly admired, Eldon, or Blackburn. But in the field of constitutional law, a region not open to an English lawyer, — and especially in one department of it, that relating to the nature and scope of the National

Constitution, he was preëminent, — first, with no one second. It is hardly possible, as regards this part of the law, to say too much of the service he rendered to his country. Sitting in the highest judicial place for more than a generation; familiar, from the beginning, with the Federal Constitution, with the purposes of its framers, and with all the objections of its critics; accustomed to meet these objections from the time he had served in the Virginia Convention of 1788; convinced of the purpose and capacity of this instrument to create a strong nation, competent to make itself respected at home and abroad, and able to speak with the voice and strike with the strength of all; assured that this was the paramount necessity of the country, and that the great source of danger was in the jealousies and adverse interests of the States, — Marshall acted on his convictions. He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient national government; and fully, also, to enforce the national re-

straints and prohibitions upon the States. In both cases he included not only the powers expressed in the Constitution, but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the federal government was established. In that long judicial life, with which Providence blessed him, and blessed his country, he was able to lay down, in a succession of cases, the fundamental considerations which fix and govern the relative functions of the nation and the States, so plainly, with such fullness, with such simplicity and strength of argument, such a candid allowance for all that was to be said upon the other side, in a tone so removed from controversial bitterness, so natural and fit for a great man addressing the "serene reason" of mankind, as to commend these things to the minds of his countrymen, and firmly to fix them in the jurisprudence of the nation; so that "when the rain descended and the floods came, and the winds blew and beat upon that house, it fell not, because it was founded upon a rock." It was Marshall's

strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, placed permanently in our judicial records, holding its own during the long emergence of a feebler political theory, and showing itself in all its majesty when war and civil dissension came, — it was largely this that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces.

I do not forget our own Webster, or others, in saying that to Marshall (if we may use his own phrase about Washington), "more than to any other individual, and as much as to one individual was possible," do we owe that prevalence of sound constitutional opinion and doctrine at the North that held the Union together; to that combination in him, of a great statesman's sagacity, a great lawyer's lucid exposition and persuasive reasoning, a great man's candor and breadth of view, and that judicial authority on the bench, allowed naturally

and as of right, to a large, sweet nature, which all men loved and trusted, capable of harmonizing differences and securing the largest possible amount of coöperation among discordant associates. In a very great degree, it was Marshall, and these things in him, that have wrought out for us a strong and great nation, one which men can love and die for; that "mother of a mighty race," that stirred the soul of Bryant half a century ago, as he dreamed how —

> "The thronging years in glory rise,
> And as they fleet,
> Drop strength and riches at thy feet;"

the nation whose image flamed in the heart of Lowell, a generation since, as he greeted her coming up out of the Valley of the Shadow of Death: —

> "Oh Beautiful, my country, ours once more! . . .
> Among the nations bright beyond compare! . . .
> What were our lives without thee?
> What all our lives to save thee?
> We reck not what we gave thee,
> We will not dare to doubt thee,
> But ask whatever else, and we will dare!"

It was early in Marshall's day that the Supreme Court first took the grave step of disregarding an act of Congress, — a coördinate department, — which conflicted with the National Constitution. The right to deal thus with their legislatures had already been asserted in the States, and once or twice it had really been exercised. Had the question related to a conflict between that Constitution and the enactment of a State, it would have been a simpler matter. These two questions, under European written constitutions, are regarded as different ones. It is almost necessary to the working of a federal system that the general government, and each of its departments, should be free to disregard acts of any department of the local states which may be inconsistent with the federal constitution. And so in Switzerland and Germany the federal courts thus treat local enactments. But there is not under any written constitution in Europe a country where a court deals in this way with the act of its coördinate legislature. In Germany, at one time, this was done, under the

influence of a study of our law, but it was soon abandoned.[1]

In the colonial period, while we were dependencies of Great Britain, our legislation was subject to the terms of the royal charters. Enactments were often disallowed by the English Privy Council, sometimes acting as mere revisers of the colonial legislation, and sometimes as appellate judicial tribunals. Our people were, in this way, familiar with the theory of a dependent legislature, one whose action was subject to reversal by judicial authority, as contrary to the terms of a written charter of government.

When, therefore, after the war of independence, our new sovereign, namely, ourselves, the people, came to substitute for the old royal charters the people's charters, what we call our "constitutions," — it was natural to expect some legal restraint upon legislation. It was not always found in terms; indeed, it was at first hardly ever, if at all, found set down in words. But it was a

[1] Coxe, *Jud. Power*, 95–102; Thayer's *Cases on Constitutional Law*, i. 146–149.

natural and just interpretation of these instruments, made in regions with such a history as ours and growing out of the midst of such ideas and such an experience, to think that courts, in the regular exercise of their functions, that is to say, in dealing with litigated cases, could treat the constitutions as law to be applied by them in determining the validity of legislation.

But this, although, as we may well think, a sound conclusion, was not a necessary one; and it was long denied by able statesmen, judges, and lawyers. An elaborate and powerful dissenting opinion by Chief Justice Gibson, of Pennsylvania, containing the most searching argument on the subject with which I am acquainted, given in 1825,[1] reaches the result that under no constitution where the power to set aside legislative enactments is not expressly given, does it exist. But it is recognized that in the Federal Constitution the power is given, as regards legislation of the States inconsistent with the Federal Constitution and laws.

[1] Eakin *v.* Raub, 12 Sergeant & Rawle, 330.

It is not always noticed that in making our Federal Constitution, there was an avoidance of any explicit declaration of such a power as touching federal legislation, while it was carefully provided for as regards the States. In the Federal Convention, there was great anxiety to control the States, in certain particulars; and various plans were put forward, such as that Congress should have a negative on state laws, and that governors of the States should be appointed by the federal authority, with power to negative state acts.

But all these, at last, were rejected, and the matter took the shape of a provision that the Constitution and the constitutional laws and treaties of the United States should be the supreme law of *the respective States;* and the judges of *the several States* should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. Later, the Committee on Style changed the phrase "law of the respective States" to "law of the land." But the language, as to binding the judges, was

still limited to the judges of the several States. Observe, then, the scope of this provision: it was to secure the authority of the federal system within the States.

As to any method of protecting the federal system within its own household, that is to say, as against Congress, it was proposed in the convention, for one thing, that each House of Congress might call upon the judges for opinions; and, again, it was urged, and that repeatedly and with great persistence, that the judges should be joined with the executive in passing on the approval or disapproval of legislative acts, — in what we call the veto power. It was explicitly said, in objecting to this, that the judges would have the right to disregard unconstitutional laws anyway, — an opinion put forward by some of the weightiest members. Yet some denied it. And we observe that the power was not expressly given. When we find such a power expressly denied, and yet not expressly given; and when we observe, for example, that leading public men, *e. g.*, so conspicuous a member of the con-

vention as Charles Pinckney of South Carolina, afterwards a senator from that State, wholly denied the power ten years later;[1] it being also true that he and others of his way of thinking urged the express restraints on state legislation, — we may justly reach the conclusion that this question, while not overlooked, was intentionally left untouched. Like the question of the bank and various others, presumably it was so left in order not to stir up enemies to the new instrument; left to be settled by the silent determinations of time, or by later discussion.

Turning now to the actual practice under the government of the United States, we find that the judges of the Supreme Court had hardly taken their seats, at the beginning of

[1] What Pinckney said in 1799 was this: "Upon no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." Wharton, *State Trials*, 412.

the government, when Chief Justice Jay and several other judges, in 1790, communicated to the President objections to the Judiciary Act, as violating the Constitution, in naming the judges of the Supreme Court to be judges also of the circuit courts.[1] These judges, however, did not refuse to act under this unconstitutional statute; and the question did not come judicially before the court until Marshall's time, in 1803,[2] when it was held that the question must now be regarded as settled in favor of the statute, by reason of acquiescence since the beginning of the government.[3]

[1] 4 Amer. Jurist, 293; Story, Const. § 1579, n.

[2] Stuart *v.* Laird, 1 Cranch, 299.

[3] Marshall, when the act of 1802 restored the old system, stated to his associates his deliberate agreement with the opinion expressed by his predecessors above referred to, and proposed to refuse to sit in the circuit court. All his brethren agreed with his view on the constitutional point, but thought the question should be regarded as at rest, by reason of the earlier practice of the court, up to 1801. This view prevailed, and was soon afterwards, as above stated, judicially adopted by the court. This statement is made by Chancellor Kent in 3 N. Y. Review, 347 (1838).

For the knowledge of the authorship of this valuable article and of another related one in 2 *ib.* 372, I am in-

In observing, historically, the earlier conceptions of the judges of the Supreme Court as to the method of dealing with unconstitutional legislation, one or two other transactions should be looked at. In 1792 (1 U. S. Statutes, 243) a statute was enacted which required the circuit court, partly composed, as we have seen, of the judges of the Supreme Court, to pass on the claims of certain soldiers and others demanding pensions, and to report to the Secretary of War; who was, in turn, to revise these returns and report to Congress. The judges found great difficulty in acting under this statute, because it imposed on them duties not judicial in their nature; and they expressed their views in various ways.

In one circuit, the judges thinking it improper to act under this statute in their judicial capacity, for the reason above-named, consented from charitable motives to serve as "commissioners." [1]

debted to the courtesy of Dr. J. S. Billings, the Director of the New York Public Library, and the investigations of Mr. V. H. Paltsits, one of the librarians in that institution.

[1] This construction, that the statute purported to au-

In the Pennsylvania circuit, the three judges wrote, in a letter to the President, that "on a late painful occasion" they had held the law invalid; and they now stated the matter to him, as being the person charged with the duty of "taking care that the laws be faithfully executed." They assured him that while this judicial action of disregarding an act of Congress had been necessary, it was far from pleasant.

The judges of another circuit, before which no case had come, wrote a similar letter to the President, declaring their reasons for thinking the law invalid.

In this same year, 1792, the Pennsylvania case came regularly up to the Supreme Court, and was argued there.[1] This might have produced a decision, but none was ever given; and in the next year a change in the statute provided relief for the pension claimants in another way.

It is to be remarked, then, that this mat-

thorize their acting in that capacity was afterwards, in 1794, held by the Supreme Court to be wrong. Yale Todd's Case, 13 Howard, 52.

[1] Hayburn's Case, 2 Dallas, 409.

ter resulted in no decision by the Supreme Court of the United States on the question of the constitutionality of the pension act; it produced only a decision at one of the circuits, and informal expressions of opinion from most of the judges.

These non-judicial communications of opinion to the President seem, as has been said, to have proceeded on the theory of furnishing information to one whose official duty it was to see that the fundamental law was faithfully carried out; just as "Councils of Revision," established by the constitutions of Pennsylvania and Vermont, were to report periodically as to infractions of the constitution.

It was, perhaps, these practices of private communication between the President and the judges that led very soon to another interesting matter, — a formal request by the President, in 1793, for an opinion from the judges on twenty-nine questions relating to the treaties with France. This request accorded with a colonial practice of asking such opinions from judges; a usage centu-

ries old in England, and preserved to-day in the constitutions of a few States in this country. The judges, however, declined answering these questions, "considering themselves," says Marshall, in his "Life of Washington," "merely as constituting a legal tribunal for the decision of controversies brought before them in legal form."[1] Although this seems to have been obviously the right course, since the proposition to give power to put questions to the judges in this way had been considered in the Federal Convention and not allowed, yet we may remark how convenient such a power would often have proved. If it be admitted, as it always has been in England, and is, almost universally, here, that such opinions are merely learned advice and bind nobody, not even the judges, they would often afford the executive and Congress much needed and early help upon constitutional questions in serious emergencies; such, for example, as have lately presented themselves in our own history.

[1] Volume v., p. 444 (Philadelphia edition, 1807).

After this, there was an occasional allusion in the opinions of the Supreme Court to the question of the power of that court to pass on the constitutionality of Federal enactments as being an undecided and more or less doubtful question. But not until 1803, early in Marshall's time, was the point judicially presented to the Supreme Court. It came up in the case of Marbury *v.* Madison,[1] the first case at the third term after any opinions of Marshall were reported. In that case, an act of Congress was declared unconstitutional.

It was more than half a century before that happened again.

Marbury *v.* Madison was a remarkable case. It was connected intimately with certain executive action for which Marshall as Secretary of State was partly responsible. For various reasons the case must have excited peculiar interest in his mind. Within three weeks before the end of Adams's administration, on February 13, 1801, while Marshall was both Chief Justice and Secre-

[1] 1 Cranch, 137.

tary of State,[1] an act of Congress had abolished the old system of circuit and district courts, and established a new one. This gave to the President, Adams, the appointment of many new judges, and kept him and his secretary busy, during the last hours of the administration, in choosing and commissioning the new officials.

And another thing. The Supreme Court had consisted heretofore of six judges. This same act provided that after the next vacancy there should be five judges only. Such arrangements as these, made by a party just going out of power, were not ill calculated to create, in the mind of the party coming in, the impression of an intention to keep control of the judiciary as long as possible.

There were, to be sure, other reasons for some of this action. Several judges of the Supreme Court, as we have seen, had signified to Washington, in 1790, the opinion

[1] In like manner, Jay, commissioned Chief Justice on September 26, 1789, continued, at Washington's request, to act also as foreign secretary until Jefferson's return from Europe. Jefferson did not reach New York until March 21, 1790.

that the judiciary act of the previous year was unconstitutional in making the judges of that court judges also of the circuit court. The new statute corrected this fault. Yet, in regard to the time chosen for this very proper action, it was observable that ten years and more had been allowed to pass before the mischief so promptly pointed out by the early judges was corrected.

Again, in approaching the case of Marbury *v.* Madison, it is to be observed that another matter relating to the Supreme Court had been dealt with. This act of February 13, 1801, provided that the two terms of the court, instead of being held, as hitherto, in February and August, should thereafter be held in June and December. Accordingly, the court sat in December, 1801. It adjourned, as it imagined, to June, 1802. But, on March 8 of that year, Congress, under the new administration, repealed the law of 1801, unseated all the new judges, and reinstated the old system, with its August and February terms. And then, a little later in the year, the August

term of the court was abolished, leaving only one term a year, to begin on the first Monday in February. Thus, since the June term was abolished, and February had then passed, and there was no longer an August or a December term, the court found itself in effect adjourned by Congress from December, 1801, to February, 1803; and so it had no session during the whole of the year 1802.

If the legislation of 1801 was calculated to show the importance attached by an outgoing political party to control over the judiciary, that of 1802 might indicate how entirely the incoming party agreed with them, and how well inclined they were to profit by their own opportunities.

How was it, meantime, with the judiciary itself? Unfortunately, the Supreme Court had already been drawn into the quarrel. For, at the single December term, in 1801, held under the statute of that year, an application had been made to the court by four persons in the District of Columbia for a rule upon James Madison, Secretary of

State, to show cause why a writ of mandamus should not issue requiring him to issue to these persons certain commissions as justice of the peace, which had been left in Marshall's office undelivered at the time when he ceased to add to his present functions those of Secretary of State. They had been made out, sealed, and signed, and were supposed to have been found by Madison when he came into office, and to be now withheld by him. This motion was pending when the court adjourned, in December, 1801. Of course, a motion for a mandamus to the head of the cabinet, upon a matter of burning interest, must have attracted no little attention on the part of the new administration. Abolishing the August term served to postpone any opportunity for early action by the court, and to remind the judiciary of the limits of its power.

At last the court came together, in February, 1803, and found the mandamus case awaiting its action. It is the first one reported at that term. Since Marshall had taken his seat, there had as yet been only

five reported cases. All the opinions had been given by him, unless a few lines "by the court" may be an exception; and according to the new usage by which the Chief Justice became, wherever it was possible, the sole organ of the court, Marshall now gave the opinion in Marbury *v.* Madison. It may reasonably be wondered that the Chief Justice should have been willing to give the opinion in such a case, and especially that he should have handled the case as he did. But he was sometimes curiously regardless of conventions.

If it be asked what was decided in Marbury *v.* Madison, the answer is that this, and only this, was decided, namely, that the court had no jurisdiction to do what they were asked to do in that case (*i. e.* to grant a writ of mandamus, in the exercise of their original jurisdiction), because the Constitution allowed to the court no such power; and, although an act of Congress had undertaken to confer this jurisdiction on them, Congress had no power to do it, and therefore the act was void, and must be disregarded by the

court.[1] It is the decision upon this point that makes the case famous; and undoubtedly it was reached in the legitimate exercise of the court's power. To this important part of the case attention will be called in the next chapter.

Unfortunately, instead of proceeding as courts usually do, the opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat. It was elaborately laid down, in about twenty pages, out of the total twenty-seven which comprise the opinion, that Madison had no right to detain the commissions; and that mandamus would be the proper remedy in any court which had jurisdiction to grant it.

And thus, as the court, by its decision in this case, was sharply reminding the legislature of its limitations, so by its *dicta*, and in this irregular method, it intimated to the President, also, that his department was not exempt from judicial control. In this way

[1] And so the careful headnote of Judge Curtis in 1 Curtis's *Decisions of the Supreme Court*, 368.

two birds were neatly reached with the same stone.

Marshall made a very noticeable remark in his opinion, seeming to point to the chief executive himself, and not merely to his secretary, when he said, "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, by which the propriety or impropriety of issuing the mandamus is to be determined;" — a hint that, on an appropriate occasion, the judiciary might issue orders personally to him. This remark got illustration a few years later, in 1807, when the Chief Justice, at the trial of Aaron Burr in Richmond, ordered a subpœna to the same President, Thomas Jefferson, directing him to bring thither certain documents. It was a strange conception of the relations of the different departments of the government to each other, to imagine that a subpœna, that is to say an order accompanied with a threat of punishment, was a legitimate judicial mode of communicating with the chief executive. On Jefferson's part, this order

was received with the utmost discontent; and justly. He had a serious apprehension of a purpose to arrest him by force, and was prepared to protect himself.[1] Meantime he sent to the United States Attorney at Richmond the papers called for, but explained, with dignity, that while the executive was willing to testify in Washington, it could not allow itself to be "withdrawn from its station by any coördinate authority."

It was partly to the tendency on Marshall's part, just mentioned, to give little thought, often, to ordinary conventions, and partly to his kindness of heart, that we should attribute another singular occurrence, — the fact that he attended a dinner at the house of an old friend, one of Burr's counsel, when he knew that Burr was to be present, and when that individual, having previously been brought to Richmond under arrest, examined by Marshall, and admitted to bail, was still awaiting the action of the grand jury with reference to further judicial

[1] See Ford's *Jefferson*, ix. 62; draft of a letter to District Attorney Hay.

proceedings before Marshall himself. He accepted the invitation before he knew that Burr was to be of the company. I have heard from one of his descendants that his wife advised him not to go; but he thought it best not to seem too fastidious, or to appear to censure his old friend, the host, by staying away. He sat, we are told, at the opposite end of the table from Burr, had no communication with him, and went away early. But we must still wonder at an act which he himself afterwards much regretted.

CHAPTER IV

MARSHALL'S CONSTITUTIONAL OPINIONS

THIS is not the place for any detailed consideration of Marshall's decisions. But it would be a strange omission to leave out all consideration of what played so great a part in his life. I must draw, therefore, upon the patience of the reader, while some points are mentioned relating to that class of his opinions which is at once the most important and of the widest interest, viz., those given in constitutional cases. If these matters seem to any reader dull or unintelligible, he must be allowed full liberty to pass them by; but I cannot wholly omit them.

The keynote to Marshall's leading constitutional opinions is that of giving free scope to the power of the national government. These leading opinions may be divided into three classes: *First*, such as discuss the nature and reach of the Federal

Constitution, and the general relation of the federal government to the States. Of this class, McCulloch *v.* Maryland, probably his greatest opinion, is the chief illustration. *Second*, those cases which are concerned with the specific restraints and limitations upon the States. To this class may be assigned Fletcher *v.* Peck, the bankruptcy cases of Sturgis *v.* Crowninshield and Ogden *v.* Saunders, and Dartmouth College *v.* Woodward. *Third*, such as deal with the general theory and principles of constitutional law. There is little of this sort; except as it is incidentally touched, perhaps the only case is Marbury *v.* Madison.

If we look at these great cases merely with reference to their effect upon the history and development of the country, they are of the very first importance. When one names Marbury *v.* Madison, the first case where the Supreme Court held an act of Congress invalid, and the only one in Marshall's time; Fletcher *v.* Peck and Dartmouth College *v.* Woodward, where legislative grants and an act of incorporation are

held to be contracts, protected by the United States Constitution against state legislation impairing their obligation; and New Jersey *v.* Wilson, holding that a legislative exemption from taxation is also a contract protected in the same way; — one sees the tremendous importance of the decisions.

Of course we are not to confound this powerful effect of a judgment, or the moral approbation with which we may be inclined to view it, with the intrinsic merit of the reasoning or the legal soundness of the conclusions. It is not uncommon to speak of the reasoning in Marbury *v.* Madison and Dartmouth College *v.* Woodward with the greatest praise. But neither of these opinions is entitled to rank with Marshall's greatest work. The very common view to which I have alluded is partly referable to the fallacy which Wordsworth once remarked upon when a friend mentioned "The Happy Warrior" as being the greatest of his poems. "No," said the poet, "you are mistaken; your judgment is affected by your moral approval of the lines."

If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skillful manner in which it is worked out, there is nothing so fine as the opinion in McCulloch *v.* Maryland, given at the February term, 1819. The questions were, first, whether the United States could constitutionally incorporate a bank; and, second, if it could, whether a State might tax the operations of the bank; as, in this instance, by requiring it to use stamped paper for its notes. The bank was sustained and the tax condemned.

In working this out, it was laid down that while the United States is merely a government of enumerated powers, and these do not in terms include the granting of an incorporation, yet it is a government whose powers, though limited in number, are in general supreme, and also adequate to the great national purposes for which they are given; that these great purposes carry with them the power of adopting such means, not prohibited by the Constitution, as are fairly

conducive to the end; and that incorporating a bank is not forbidden, and is useful for several ends. Further, the paramount relation of the national government, whose valid laws the Constitution makes the supreme law of the land, forbids the States to tax, or to "retard, impede, burden, or in any way control" the operations of the government in any of its instrumentalities.

This was the opinion of a unanimous court, in which five out of the seven judges had been nominated by a Republican President. But it caused great excitement at the South. On March 24, 1819, Marshall wrote from Richmond to Judge Story: "Our opinion in the bank case has roused the sleeping spirit of Virginia, if indeed it ever sleeps. It will, I understand, be attacked in the papers with some asperity, and as those who favor it never write for the public it will remain undefended, and of course be considered as *damnably heretical*." Again, two months later, "The opinion in the bank case continues to be denounced by the Democracy of Virginia. . . . If the prin-

ciples which have been advanced on this occasion were to prevail the Constitution would be converted into the old Confederation."

Another great opinion, of the same class, and also bitterly attacked, was given in the case of Cohens *v.* Virginia, in 1821. This case came up on a writ of error from a local court at Norfolk. Cohens had been convicted of selling lottery tickets there, contrary to the statute of Virginia. He had set up as a defense an act of Congress providing for drawing lotteries in the city of Washington, and insisted that this authorized his selling tickets in Virginia. When the case reached the Supreme Court of the United States, the counsel for the State first denied the jurisdiction of that court, on the ground, among others, that the Constitution allowed no such appeal from a state court, and that the Judiciary Act of 1789 was unconstitutional in purporting to authorize it. In an elaborate opinion by Marshall, one of his greatest efforts, these contentions were negatived. When afterwards, the case came

to be argued on the merits, the decision below was sustained, on the ground that the act of Congress did not purport to authorize the sale of tickets in any State which forbade the sale of them.

Here again the court was unanimous; and it was composed of the same judges who decided McCulloch *v.* Maryland. But the reception of Cohens *v.* Virginia at the South was even worse than that accorded the other case. Judge Roane, of the Court of Appeals in Virginia, attacked the opinion anonymously in the newspapers, with what Marshall called "coarseness and malignity." Jefferson, also, bitterly objected to it.

Of two other cases belonging in the same class of Marshall's opinions, viz., Gibbons *v.* Ogden, in 1824, and Brown *v.* Maryland, in 1827, it is enough here to say that they deal with one of the most difficult and perplexed topics of constitutional law, namely, the coördination of the functions of the national and state governments, in regard to the power granted to Congress to regulate foreign and interstate commerce, a subject of

great importance and difficulty, on which the decisions of the Supreme Court are now and long have been involved in much confusion and uncertainty. Gibbons *v.* Ogden brought into question the constitutionality of a law of New York granting to Fulton, the inventor, the sole right of navigating the waters of New York by steam. The grant had been sustained by Chancellor Kent and by the New York Court of Appeals; but these decisions were now overruled in a famous and powerful opinion. In two other cases on this subject, also of great importance, Marshall gave leading opinions. It may fairly be thought that his treatment of the general question involved in these cases, instructive as it was, was yet less fruitful and less far-seeing than in most of his other great cases.

He was now in a region pretty closely connected with the second class of cases, above named; a set of cases, where even so great a man as Marshall erred sometimes, from interpreting too literally and too narrowly the restraints upon the States. It was

natural, in giving full scope to the authority of the general government, that he should be inclined to apply, with their fullest force and operation, these clauses of restraint and prohibition. His great service to the country and his own generation was that of planting the national government on the broadest and strongest foundations. That, as he rightly conceived, was the one chief necessity of his time. In doing this, when it came to considering the reach that must also be allowed to the States, and just how the coördination of the two systems should be worked out, probably no one man, no one court, no human wisdom was adequate, then, to mapping it all out. Time alone, and a long succession of men, after some ages of experience, might suffice for that. The wisdom of those who made the Constitution, as it has lately been said, was mainly shown "in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations." But, as time went on, definitions and specifications had to be made and applied; silence, abstinence,

generality, were no longer adequate. And in the class of cases, now referred to, great and far-reaching as were the results of Marshall's labor, and unqualifiedly as they are often praised, one may perceive, as I venture to think, a less comprehensive and statesmanlike grasp of the problems and their essential conditions than are found in some other parts of his work.

And so, when the Chief Justice, in 1812, held, without argument, that a grant of land by a State, with a privilege of exemption from taxation, contained a contract against future taxation, protected, even in the hands of subsequent holders, by the constitutional provisions against impairing the obligation of contracts, something was done which would probably not be done to-day, if the question came up for the first time. Certainly the soundness of the doctrine has been frequently denied by judges of the Supreme court, and it has only survived through the device of construing all grants in the narrowest manner. "Yielding," says the Court in a recent case, "to the doctrine that im-

munity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms." And again the court has recently remarked on the "well-settled rule that exemptions from taxation are . . . not to be extended beyond the exact and express language used, construed *strictissimi juris*."

Again, in Dartmouth College *v.* Woodward, in 1819, when it was held that a legislative grant of incorporation was a contract protected by the same clause of the Constitution, something was done from which the court was subsequently obliged to recede in an important degree. Acts of incorporation for the manufacture of beer, for carrying on slaughter-houses, for dealing in offal, and for conducting a lottery, — a reputable business in 1819, when the Dartmouth College case was decided, — such acts as these have been treated by the Supreme Court as not being thus protected. It is held that no legislative body can contract to part with

the full power to provide for the health, morals, and safety of the community. Such things, it is said, are not the proper subject-matter of legislative contract, — a doctrine which it has been widely thought should, originally, have been applied to all acts of incorporation. "The State," says a distinguished judge, and writer on constitutional law, in speaking of the Dartmouth College doctrine and its development, "was stripped, under this interpretation, of prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police power been dexterously declared paramount, and used as a means of rescinding improvident grants." [1]

In the great bankruptcy cases of Sturgis *v.* Crowninshield and Ogden *v.* Saunders, where it was held, in 1819 and 1827, that the constitutional provision as to impairing the obligation of contracts forbade the State to enact an insolvency law which should discharge a person from liability on a

[1] Hare, Am. Const. Law, i. 607.

contract made before the law; and then again that it did not forbid the same thing as touching a contract made after the law, Marshall, who gave the opinion in the first case, put it on a ground equally applicable to the second; and so, in the second case, gave a dissenting opinion. The obligation of the contract, he said, comes from the agreement of the party; it does not arise from the law of the State at the time it was made, entering into or operating on the contract. But this doctrine and this reasoning were justly disallowed.

Finally, in 1830, in Craig *v.* Missouri, Marshall gave the opinion that certain certificates issued by a State in return for deposits, and intended to circulate as money, were bills of credit; and as such forbidden by the Constitution. There were three dissenting opinions; and soon after Marshall's death, a different doctrine was established by the court, — wisely it would seem, — and has ever since been maintained.[1]

Coming now to the third class of cases

[1] See, however, Chancellor Kent in 2 N. Y. Rev. 372.

mentioned above, that which deals with the fundamental conceptions and theory of our American doctrine of constitutional law, Marbury *v.* Madison is the chief case. In speaking of that case I have purposely delayed until this point any reference to this aspect of it. While, historically, this part of it is what gives the case its chief importance, yet it occupies only about a quarter of the opinion.

In outline, the argument there presented is as follows: The question is whether a court can give effect to an unconstitutional act of the legislature. This question is answered, as having little difficulty, by referring to a few "principles long and well established." (1) The people, in establishing a written constitution and limiting the powers of the legislature, intend to control it; else the legislature could change the constitution by an ordinary act. (2) If a superior law is not thus changeable, then an unconstitutional act is not law. This theory, it is added, is essentially attached to a written constitution. (3) If the act is void, it

cannot bind the court. The court has to say what the law is, and in saying this must judge between the Constitution and the act. Otherwise, a void act would be obligatory; and this would be saying that constitutional limits upon legislation may be transgressed by the legislature at pleasure, and thus these limits would be reduced to nothing. (4) The language of the Federal instrument gives judicial power in "cases arising under the Constitution." Judges are thus in terms referred to the Constitution. They are sworn to support it and cannot violate it. And so, it is said, in conclusion, the peculiar phraseology of the instrument confirms what is supposed to be essential to all written constitutions, that a law repugnant to it is void, and that the courts, as well as other departments, are bound by the constitution.

The reasoning is mainly that of Hamilton, in his short essay of a few years before in the "Federalist." The short and dry treatment of the subject, as being one of no real difficulty, is in sharp contrast with the protracted reasoning of McCulloch *v.*

Maryland, Cohens *v.* Virginia, and other great cases; and this treatment is much to be regretted. Absolutely settled as the general doctrine is to-day, and sound as it is, when regarded as a doctrine for the descendants of British colonists, there are grave and far-reaching considerations — such, too, as affect to-day the proper administration of this extremely important power — which are not touched by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning does not answer the difficulties that troubled Swift, afterwards chief justice of Connecticut, and Gibson, afterwards chief justice of Pennsylvania, and many other strong, learned, and thoughtful men; not to mention Jefferson's familiar and often ill-digested objections.

It assumes as an essential feature of a written constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave dis-

tinction between the power of disregarding the act of a coördinate department, and the action of a federal court in dealing thus with the legislation of the local States; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of case, while denying it in the other.

Had Marshall dealt with this subject after the fashion of his greatest opinions he must also have considered and passed upon certain serious suggestions arising out of the arrangements of our own constitutions and the exigencies of the different departments. All the departments, and not merely the judges, are sworn to support the Constitution. All are bound to decide for themselves, in the first instance, what this instrument requires of them. None can have help from the courts unless, in course of time, some litigated case should arise; and of some questions it is true that they never can arise in the way of litigation. What was Andrew Johnson to do when the Recon-

struction Acts of 1867 had been passed over his veto by the constitutional majority, while his veto had gone on the express ground, still held by him, that they were unconstitutional? He had sworn to support the Constitution. Should he execute an enactment which was contrary to the Constitution, and so void? Or should he say, as he did say to the court, through his Attorney-General, that "from the moment [these laws] were passed over his veto, there was but one duty, in his estimation, resting upon him, and that was faithfully to carry out and execute these laws"?[1] And why is he to say this?

Again, what is the House of Representatives to do when a treaty, duly made and ratified by the constitutional authority, namely, the President and Senate, comes before it for an appropriation of money to carry it out? Has the House, under these circumstances, anything to do with the question of constitutionality? If it thinks the treaty unconstitutional, and so void, can it

[1] Mississippi *v.* Johnson, 4 Wallace, 475, 492 (1866).

vote to carry it out? If it can, how is this justified?

Is the situation necessarily different when a court is asked to enforce a legislative act? The courts are not strangers to the case of political questions, where they must refuse to interfere with the acts of the other departments, — as in the case relating to Andrew Johnson just referred to; and in dealing with what are construed to be merely directory provisions of the Constitution; and with the cases, well approved in the Supreme Court of the United States, where courts refuse to consider whether provisions of a constitution have been complied with, which require certain formalities in passing laws, — accepting as final the certificate of the officers of the political departments. A question, passed upon by those departments, is thus refused any discussion in the judicial forum, on the ground, to quote the language of the Supreme Court, that "the respect due to coequal and independent departments requires the judicial department to act upon this assurance."

So far as any necessary conclusion is concerned, it might fairly have been said, with us, as it is said in Europe, that the real question in all these cases is not whether the act is constitutional, but whether its constitutionality can properly be brought in question before a given tribunal. Could Marshall have had to deal with this great question, in answer to Chief Justice Gibson's powerful opinion in Eakin *v.* Raub, in 1825,[1] instead of deciding it without being helped or hindered by any adverse argument at all, as he did, we should have had a far higher exhibition of his powers than the case now affords.[2]

[1] 12 Serg. & Rawle, 330; s. c. 1 Thayer's Const. Cases, 133.

[2] As to this general subject see "Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review*, 129. Compare the remark of Lord John Russell: "Every political constitution, in which different bodies share the supreme power, is only enabled to exist by the forbearance of those among whom this power is distributed." I quote this from the motto of Woodrow Wilson's fifth chapter in his *Congressional Government*.

CHAPTER V

THE WORKING OF OUR SYSTEM OF CONSTITUTIONAL LAW

I HAVE drawn attention to the immense service that Chief Justice Marshall rendered to his country in the field of constitutional law, and have considered a few of the cases. Since his time not twice the length of his term of thirty-four years has gone by, but more than five times the number of volumes that sufficed for the opinions of the Supreme Court during his period is required for those of his successors on the bench. Nor does even that proportion indicate the increase in the quantity of the court's business which is referable to this particular part of the law. It has enormously increased. When one reflects upon the multitude, variety, and complexity of the questions relating to the regulation of interstate commerce, upon the portentous and ever

increasing flood of litigation to which the Fourteenth Amendment has given rise; upon the new problems in business, government, and police which have come in with steam and electricity, and their ten thousand applications; upon the growth of corporations and of wealth, the changes of opinion on social questions, such as the relation of capital and labor, and upon the recent expansions of our control over great and distant islands, — we seem to be living in a different world from Marshall's.

Under these new circumstances, what is happening in the region of constitutional law? Very serious things, indeed.

The people of the States, when making new constitutions, have long been adding more and more prohibitions and restraints upon their legislatures. The courts, meantime, in many places, enter into the harvest thus provided for them with a light heart, and too promptly and easily proceed to set aside legislative acts. The legislatures are growing accustomed to this distrust, and more and more readily incline to justify it,

and to shed the consideration of constitutional restraints, — certainly as concerning the exact extent of these restrictions, — turning that subject over to the courts; and, what is worse, they insensibly fall into a habit of assuming that whatever they can constitutionally do they may do, — as if honor and fair dealing and common honesty were not relevant to their inquiries.

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives.

From these causes there has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century and more ago, in

framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted, — would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed." And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his asso-

ciates any part of the kind things they had said, it would be this, that they had "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."

That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; to-day it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois and the "Granger Cases," twenty-five years ago, and

in the "Legal Tender Cases," nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all, — that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them, — the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature, — the great, continuous body itself, abstracted from all the transi-

tory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coördinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coördinate

legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course — the true course of judicial duty always — will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it.

CHAPTER VI

LETTERS OF MARSHALL

No systematic attempt seems ever to have been made to collect Marshall's letters. It should be done. Only a few of his family letters have yet found their way into print. One of them, to his wife, is quoted in a previous page. In another to her, written on March 9, 1825, referring to the inauguration of President John Quincy Adams, he says: "I administered the oath to the President in the presence of an immense concourse of people, in my new suit of domestic manufacture. He, too, was dressed in the same manner, though his clothes were made at a different establishment. The cloth is very fine and smooth."

In a letter of December 7, 1834,[1] to his grandson, "Mr. John Marshall, jr.," he gives the boy some advice about writing

[1] *The Nation*, February 7, 1901.

which is a good commentary on the extraordinary neatness and felicity, the close fit, of his own clear, compact, and simple style: —

"The man who by seeking embellishment hazards confusion is greatly mistaken in what constitutes good writing. The meaning ought never to be mistaken. Indeed, the readers should never be obliged to search for it. The writer should always express himself so clearly as to make it impossible to misunderstand him. He should be comprehended without an effort. The first step towards writing and speaking clearly is to think clearly. Let the subject be perfectly understood, and a man will soon find words to convey his meaning to others."

A letter to James Monroe, dated Richmond, December 2, 1784, was written while Marshall was a member of the House of Delegates. He writes: "Not a bill of public importance, in which an individual was not particularly interested, has passed. The exclusive privilege given to Rumsey and his assigns to build and navigate his new in-

vented boats is of as much, perhaps more, consequence than any other bill we have passed. We have rejected some which, in my conception, would have been advantageous to this country. Among these I rank the bill for encouraging intermarriage with the Indians. Our prejudices, however, oppose themselves to our interests, and operate too powerfully for them. . . .

"I shewed my father [then, probably, living in Kentucky] that part of your letter which respects the western country. He says he will render you every service of the kind you mention which is within his power with a great deal of pleasure. He says, though, that Mr. Humphrey Marshall, a cousin and brother of mine,[1] is better acquainted with the lands and would be better enabled to choose for your advantage than he would. If, however, you wish rather to depend on my father I presume he may avail himself of the knowledge of his son-in-law. I do not know what to say to your scheme of selling out. If you can execute it you will

[1] He married John Marshall's sister.

have made a very capital sum; if you can retain your lands you will be poor during life unless you remove to the western country, but you will have secured for posterity an immense fortune. I should prefer the selling business, and if you adopt it I think you have fixed on a very proper price.

"Adieu. May you be very happy is the wish of your J. MARSHALL."

In another letter to Monroe, while the latter was Madison's Secretary of State, dated Richmond, June 25, 1812, just as the war was beginning, he says: —

"On my return to-day from my farm, where I pass a considerable portion of my time in *laborious relaxation*, I found a copy of the message of the President, of the 1st inst., accompanied by the report of the Committee of Foreign Relations and the declaration of war against Britain, under cover from you.

"Permit me to subjoin to my thanks for this mark of your attention my fervent wish that this momentous measure may, in its

operation on the interest and honor of our country, disappoint only its enemies.

"Whether my prayer be heard or not, I shall remain with respectful esteem,

"Your obedient servant,

"J. MARSHALL."

When Marshall went to France as envoy in 1797, he wrote several long and interesting letters to Washington, acquainting him with whatever foreign intelligence might interest him.[1] The following passages from the first letter, a very long one, will show the interest of these papers, and the exactness of the information they convey: —

"THE HAGUE, 15th Sept., 1797.

"DEAR SIR, — The flattering evidences I have received of your favorable opinion, which have made on my mind an impression only to wear out with my being, added to a conviction that you must feel a deep interest in all that concerns a country to

[1] These letters were printed in 1897 in the *American Hist. Review*, ii. 294. I was not aware of their ever having been printed, until after these pages were in type.

whose service you have devoted so large a portion of your life, induce me to offer you such occasional communications as, while in Europe, I may be enabled to make, and induce a hope that the offer will not be deemed an unacceptable or unwelcome intrusion.

"Until our arrival in Holland we saw only British and neutral vessels. This added to the blockade of the Dutch fleet in the Texel, of the French fleet in Brest, and of the Spanish fleet in Cadiz, manifests the entire dominion which one nation at present possesses over the seas. By the ships of war which met us we were three times visited, and the conduct of those who came on board was such as would proceed from general orders to pursue a system calculated to conciliate America. Whether this be occasioned by a sense of justice and the obligations of good faith, or solely by the hope that the perfect contrast which it exhibits to the conduct of France may excite keener sensations at that conduct, its effects on our commerce are the same.

"The situation of Holland is truly interesting. Though the face of the country still exhibits a degree of wealth and population still unequaled in any part of Europe, its decline is visible. The great city of Amsterdam is in a state of blockade. More than two thirds of its shipping lie unemployed in port. Other seaports suffer, though not in so great a degree. In the mean time the requisitions made upon them are enormous. They have just completed the payment of the 100,000,000 of florins (equal to 40,000,000 of dollars) stipulated by treaty; they have sunk, on the first entrance of the French, a very considerable sum in assignats; they made large contributions in specifics, and they pay, feed, and clothe an army estimated, as I am informed, at near three times its real number. It is supposed that France has by various means drawn from Holland about 60,000,000 of dollars. This has been paid, in addition to the natural expenditures, by a population of less than 2,000,000. Nor, should the war continue, can the contributions of Holland stop here.

The increasing exigencies of France must inevitably increase her demands on those within her reach.

. . . . . .

"The political opinions which have produced the rejection of the Constitution, and which, as it would seem, can only be entertained by intemperate and ill-informed minds, unaccustomed to a union of theory and practice of liberty, must be associated with a general system which if brought into action will produce the same excesses here which have been so justly deplored in France. The same materials exist, though not in so great a degree. They have their clubs, they have a numerous poor, and they have enormous wealth in the hands of a minority of the nation. On my remarking this to a very rich and intelligent merchant of Amsterdam, and observing that if one class of men withdrew itself from public duties and offices it would be immediately succeeded by another, which would acquire a degree of power and influence that might be exercised to the destruction of those who had retired

from society, he replied that the remark was just, but that they relied on France for a protection from those evils which she had herself experienced. That France would continue to require great supplies from Holland, and knew its situation too well to permit it to become the prey of anarchy. That Holland was an artificial country acquired by persevering industry, and which could only be preserved by wealth and order. That confusion and anarchy would banish a large portion of that wealth, would dry up its sources, and would entirely disable them from giving France that pecuniary aid she so much needed. That under this impression many who, though friendly to the revolution, saw with infinite mortification French troops garrison the towns of Holland, would now see their departure with equal regret. Thus they willingly relinquished national independence for individual safety. What a lesson to those who would admit foreign influence into the United States!" . . .

The condition of affairs in Paris at that time is illustrated by the fact that Marshall's

later letters, written from there, were not signed; and that they allude to the action of himself and his associates in the third person. Thus, writing from Paris, October 24, 1797, in the character of an anonymous private American to an unnamed correspondent, he says: —

"Causes which I am persuaded you have anticipated forbid me to allow that free range of thought and expression which could alone apologize for the intrusive character my letters bear. Having, however, offered what I cannot furnish, I go on to substitute something else perhaps not worth receiving. . . .

"Our ministers have not yet, nor do they seem to think it certain that they will be received. Indeed they make arrangements which denote an expectation of returning to America immediately. The captures of our vessels seem to be only limited by the ability to capture. That ability is increasing, as the government has let out to hardy adventurers the national frigates. Among those who plunder us, who are most active in this

infamous business, and most loud in vociferating criminations equally absurd and untrue, are some unprincipled apostates who were born in America. The sea rovers by a variety of means seem to have acquired great influence in the government. This influence will be exerted to prevent an accommodation between the United States and France, and to prevent any regulations which may intercept the passage of the spoils they have made on our commerce, to their pockets. The government, I believe, is but too well disposed to promote their views."

In a letter to Judge Peters, of Philadelphia, dated November 23, 1807, just after the Burr trial, after thanking his correspondent for a volume of "Admiralty Reports," he has something to say of that case: —

"I have as yet been able only to peep into the book, not to read many of the cases. I received it while fatigued, and occupied with the most unpleasant case which has ever been brought before a judge in this or, perhaps, in any other country which affected

to be governed by laws; since the decision of which I have been entirely from home. The day after the commitment of Colonel Burr for a misdemeanor I galloped to the mountains, whence I only returned in time to perform my North Carolina circuit, which terminates just soon enough to enable me to be here to open the court for the ancient dominion. Thus you perceive I have sufficient bodily employment to prevent my mind from perplexing itself about the attentions paid me in Baltimore and elsewhere. I wish I could have had as fair an opportunity to let the business go off as a jest here as you seem to have had in Philadelphia; but it was most deplorably serious, and I could not give the subject a different aspect by treating it in any manner which was in my power. I might, perhaps, have made it less serious to myself by obeying the public will, instead of the public law, and throwing a little more of the sombre upon others."

CHAPTER VII

MARSHALL AS A CITIZEN AND A NEIGHBOR

THERE is more to be said of Marshall's private and personal life. After he went on the bench, his principal non-judicial work, in the nature of public service, seems to have been writing the "Life of Washington," with the later revision and reconstruction of that work, and his activity in a few matters of not too partisan a sort, such as were likely to engage the attention of a public-spirited citizen.

In 1813, at a meeting of the citizens of Richmond, he was appointed member of a Committee of Vigilance, to aid in defending the city against attack from the British. On June 28 he made a report, for a sub-committee, that it was inexpedient to undertake to fortify the city. After stating the topographical and other reasons for such an opinion, the report goes on thus: "Your committee

are too conscious of their destitution of professional skill to advance with any confidence the opinion they have formed; but the resolution under which they act having made it their duty to give an opinion, they say, though with much diffidence, that they do not think any attempt to fortify the city advisable. It is to be saved by operations in the open field, by facing the enemy with a force which may deter him from any attempt to penetrate the interior of our country, and which may impress him with the danger of separating himself from his ships. If this protection cannot be afforded, Richmond must share the fate of other places which are in similar circumstances. Throughout the world, open towns belong to the army which is master of the country. . . . If the militia be put into the best condition for service, if the light artillery be well manned and supplied with horses, so as to move with celerity to any point where its services may be required; if the cavalry be kept entire and in active service; if the precaution of supplying in sufficient quantity all the im-

plements of war be taken, your committtee hope and believe that this town will have no reason to fear the invading foe." [1]

In those efforts on the part of some of the leaders of Virginia and the South, early in the century, to rid themselves of slavery, to which we at the North have never done sufficient justice, Marshall took an active part.

The American Colonization Society was organized in 1816 or 1817, with Bushrod Washington for president. In 1823 an auxiliary society was organized at Richmond, of which Marshall was president, an office which he held nearly or quite up to the time of his death. It is interesting to observe that one of the plans for colonization was to have worked out the abolition of slavery in Virginia in the year 1901. Of slavery Marshall wrote to a friend, in 1826 : "I concur with you in thinking that nothing portends more calamity and mischief to the Southern States than their slave population. Yet they seem to cherish the evil, and to view with

[1] *The Virginia Magazine of History*, vii. 233.

immovable prejudice and dislike everything which may tend to diminish it. I do not wonder that they should resist any attempt, should one be made, to interfere with the rights of property, but they have a feverish jealousy of measures which may do good without the hazard of harm, that, I think, very unwise."

In 1828, Marshall presided, in Virginia, over a convention to promote internal improvements. On this subject he held and freely expressed views, such as are now generally entertained, as to the power of the general government, and the expediency of exerting them.[1]

In 1829, he allowed himself to be elected to the Virginia convention for revising the state constitution, and took an active part in the debates. "Tall, in a long surtout of blue, with a face of genius and an eye of fire," is the description that is given of him in the convention. On several questions he influenced greatly the course of the convention, especially in continuing, for a score of

[1] Chancellor Kent in *New York Review*, 348, 349.

years to come, the judicial tenure of office during good behavior.

Marshall's membership of the society of Free Masons is sometimes spoken of. It should be said that he lived to condemn that organization. During the political excitement which followed the abduction of Morgan, he was asked for information as to some praise of Freemasonry which had been publicly attributed to him, and replied, in October, 1833, that he was not particularly interested in the anti-masonic excitement. "The agitations which convulse the North did not pass the Potomac. Consequently . . . I felt no inclination to volunteer in a distant conflict, in which the wounds that might be received would not be soothed by the consoling reflection that he suffered in the performance of a necessary duty." And he added that he had "never affirmed that there was any positive good or ill in the institution itself." This cautious letter is illustrated by an earlier one, in July, 1833, in which, writing confidentially to Edward Everett, he says that he became a Mason

soon after he entered the army, and afterwards continued in the society because his neighbors did. "I followed the crowd for a time, without attaching the least importance to its object or giving myself the trouble to inquire why others did. It soon lost its attraction, and though there are several lodges in the city of Richmond, I have not been in one of them for more than forty years, except on an invitation to accompany General Lafayette, nor have I been a member of one of them for more than thirty. It was impossible not to perceive the useless pageantry of the whole exhibition." And he adds that he has become convinced "that the institution ought to be abandoned, as one capable of producing much evil and incapable of producing any good which might not be effected by safe and open means." [1]

As to Marshall's religious affiliations, he was a regular and devoted attendant, all his life, of the Episcopal Church, in which he

[1] *Anti-masonic Pamphlets*, Harvard College Library, No. 12, p. 18; *ib.* No. 9.

was brought up; taking an active part in the services and the responses, and kneeling in prayer, we are told, even when the pews were so narrow that his tall form had to be accommodated by the projection of his feet into the aisle. His friend, Bishop Meade, the Episcopal bishop of Virginia, states that he was never a communicant in that church; and he quotes a letter from an Episcopal clergyman who often visited Mrs. Harvie, Marshall's only daughter, in her last illness, and who reports from her the statement that, during the last months of his life, he told her "that the reason why he never communed was that he was a Unitarian in opinion, though he never joined their society." It is added, however, in the same letter, that Mrs. Harvie, a person "of the strictest probity, the most humble piety, and the most clear and discriminating mind," also said that, during these last months, Marshall read Keith on Prophecy, and was convinced by that work, and the fuller investigation to which it led, of the supreme divinity of Jesus, and wished to commune,

but thought it his duty to do it publicly; and while waiting for the opportunity, died.

The reader of such a statement seems to perceive or to conjecture an anxiety to relieve the memory of the Chief Justice of an opprobrium. Whatever the exact fact may be about this late change in opinion, there is little occasion to be surprised that Marshall shared, during his active life, the opinions of his friend Judge Story. The genuineness and the simplicity of Marshall's lifelong piety are indicated by another statement reported from Mrs. Harvie: "Her father told her that he never went to bed without concluding his prayer with those which his mother taught him when a child, viz. the Lord's prayer and the prayer beginning, 'Now I lay me down to sleep.'"

Marshall was a man of vigorous physique. "He was always," says a descendant,[1] "devoted to walking, but more especially before breakfast in the early morning. A venerable professor I met in Washington told me that, when he was a boy, regularly every morning

[1] Mrs. Hardy, 8 *Green Bag*, 487.

at seven o'clock, when he was on his way to school, he met the Chief Justice returning from a long walk. He walked rapidly always. Hon. Horace Binney says: 'After doing my best one morning to overtake Chief Justice Marshall, in his quick march to the Capitol, when he was nearer to eighty than seventy, I asked him to what cause in particular he attributed that strong and quick step, and he replied that he thought it was most due to his commission in the army of the Revolution, in which he had been a regular foot practitioner for six years.'"

We often hear of the Chief Justice at his "Quoit Club." He was a famous player at quoits. A club had been formed by some of the early Scotch settlers of Richmond, and it came to include among its members leading men of the city, such as Marshall, Wirt, Nicholas, Call, Munford, and others. Chester Harding, the artist who painted the full-length portrait of Marshall that hangs in the Boston Athenæum, tells us of seeing him at the Quoit Club. Fortunately, language does not, like paint, limit the artist

to a single moment of time. He gives us the Chief Justice in action. Marshall was then attending the Virginia Constitutional Convention, which sat from October, 1829, to January, 1830. The Quoit Club used to meet every week in a beautiful grove, about a mile from the city. Harding went early. "I watched," he says, "for the coming of the old chief. He soon approached, with his coat on his arm and his hat in his hand, which he was using as a fan. He walked directly up to a large bowl of mint julep, which had been prepared, and drank off a tumblerful of the liquid, smacking his lips, and then turned to the company with a cheerful 'How are you, gentlemen?' He was looked upon as the best pitcher of the party, and could throw heavier quoits than any other member of the club. The game began with great animation. There were several ties; and before long I saw the great Chief Justice of the United States down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved

to be in the right, the woods would ring with his triumphant shout." [1]

[1] In speaking of this same Club, Mr. G. W. Munford says: "We have seen Mr. Marshall, in later times, when he was Chief Justice of the United States, on his hands and knees, with a straw and a penknife, the blade of the knife stuck through the straw, holding it between the edge of the quoit and the hub; and when it was a very doubtful question, pinching or biting off the ends of the straw, until it would fit to a hair."

James K. Paulding has preserved an entertaining account of a game, in 1820, when Jarvis, the artist, was present, playing, apparently on the same side with the Chief Justice. "I remember," he says, "in the course of the game, and when the parties were nearly at a tie, that some dispute arose as to the quoit nearest the meg. The Chief Justice was chosen umpire between the quoit belonging to Jarvis and that of Billy Haxall. The judge bent down on one knee, and with a straw essayed the decision of this important question on which the fate of the game in a great measure depended. After nicely measuring, and frequently biting off the end of the straw, 'Gentlemen,' said he, 'you will perceive this quoit would have it, but the rule of the game is to measure from the visible iron. Now that clod of dirt hides almost half an inch. But, then he has a right to the nearest part of the meg; and here, as you will perceive, is a splinter, which belongs to and is part of the meg, as much as the State of Virginia is a part of the Union. This is giving Mr. Haxall a great advantage; but, notwithstanding, in my opinion, Jarvis has it by at least the sixteenth part of an inch, and so I decide, like a just judge, in my own favor.'" 2 *Lippincott's Magazine*, 623, 626. It is said that he was often appointed thus to be judge in his own case.

An entertaining account has been preserved[1] of a meeting of the club, held, apparently, while Marshall was still at the bar, at which he and Wickham — a leading Virginia lawyer, one of the counsel of Aaron Burr — were the caterers. At the table Marshall announced that at the last meeting two members had introduced politics, a forbidden subject, and had been fined a basket of champagne, and that this was now produced, as a warning to evil-doers; as the club seldom drank this article, they had no champagne glasses, and must drink it in tumblers. Those who played quoits retired, after a while, for a game. Most of the members had smooth, highly polished brass quoits. But Marshall's were large, rough, heavy, and of iron, such as few of the members could throw well from hub to hub. Marshall himself threw them with great success and accuracy, and often "rang the meg." On this occasion Marshall and the Rev. Mr. Blair led the two parties of players. Marshall played first, and rang the

[1] See *The Two Parsons*, by G. W. Munford.

meg. Parson Blair did the same, and his quoit came down plumply on top of Marshall's. There was uproarious applause, which drew out all the others from the dinner; and then came an animated controversy as to what should be the effect of this exploit. They all returned to the table, had another bottle of champagne, and listened to arguments, one from Marshall, *pro se*, and one from Wickham for Parson Blair. The company decided against Marshall. His argument is a humorous companion piece to any one of his elaborate judicial opinions. He began by formulating the question, "Who is winner when the adversary quoits are on the meg at the same time?" He then stated the facts, and remarked that the question was one of the true construction and application of the rules of the game. The one first ringing the meg has the advantage. No other can succeed who does not begin by displacing this first one. The parson, he willingly allowed, deserves to rise higher and higher in everybody's esteem; but then he must n't do it by getting on

another's back in this fashion. That is more like leapfrog than quoits. Then, again, the legal maxim is, *Cujus est solum, ejus est usque ad cœlum*, — his own right as first occupant extends to the vault of heaven; no opponent can gain any advantage by squatting on his back. He must either bring a writ of ejectment, or drive him out *vi et armis*. And then, after further argument of the same sort, he asked judgment, and sat down amidst great applause.

Mr. Wickham then rose, and made an argument of a similar pattern. No rule, he said, requires an impossibility. Mr. Marshall's quoit is twice as large as any other; and yet it flies from his arm like the iron ball at the Grecian games from the arm of Ajax. It is an iron quoit, unpolished, jagged, and of enormous weight. It is impossible for an ordinary quoit to move it. With much more of the same sort, he contended that it was a drawn game. After very animated voting, designed to keep up the uncertainty as long as possible, it was so decided. Another trial was had, and Marshall clearly won.

All his life he played this game. There is an account of a country barbecue in the mountain region, where a casual guest saw him, then an old man, emerge from a thicket which bordered a brook, carrying a pile of flat stones as large as he could hold between his right arm and his chin. He stepped briskly up to the company and threw them down. "There! Here are quoits enough for us all."

Of Marshall's simple habits, remarkable modesty, and engaging simplicity of conduct and demeanor, every one who knew him speaks. These things were in the grain, and outlasted all the wear and tear of life. "What was it in him which most impressed you?" asked one of his descendants, now a distinguished judge,[1] of an older relative who had known him. "His humility," was her answer. "With Marshall," wrote President Quincy, "I had considerable acquaintance during the eight years I was member of Congress, from 1805 to 1813, played chess

[1] Mr. Justice Keith, now President of the Virginia Court of Appeals.

with him, and never failed to be impressed with the frank, cordial, childlike simplicity and unpretending manner of the man, of whose strength and breadth of intellectual power I was . . . well apprised."

"Nothing was more usual," we are told, as regards his life in Richmond, "than to see him returning from market, at sunrise, with poultry in one hand and a basket of vegetables in the other." And, again, some one speaks of meeting him on horseback, at sunrise, with a bag of seeds before him, on his way to his farm, three or four miles out of town. It was of this farm that he wrote to James Monroe, his old friend and schoolmate, about passing so much time in "*laborious relaxation.*" The italics are his own.

In speaking of Marshall's personal qualities and ways, I must quote from those exquisite passages in Judge Story's address, delivered in the fall of 1835, to the Suffolk bar, in which his own true affection found expression: "Upon a first introduction he would be thought to be cold and reserved; but he was neither the one nor the other. It

was simply a habit of easy taciturnity, watching, as it were, his own turn to follow the line of conversation, and not to presume to lead it. . . . Meet him in a stage-coach as a stranger, and travel with him a whole day, and you would only be struck with his readiness to administer to the accommodation of others, and his anxiety to appropriate least to himself. Be with him the unknown guest at an inn, and he seemed adjusted to the very scene; partaking of the warm welcome of its comforts, whenever found; and if not found, resigning himself without complaint to its meanest arrangements. . . . He had great simplicity of character, manners, dress, and deportment, and yet with a natural dignity that suppressed impertinence and silenced rudeness. His simplicity . . . had an exquisite naïveté, which charmed every one, and gave a sweetness to his familiar conversation approaching to fascination. The first impression of a stranger, upon his introduction to him, was generally that of disappointment. It seemed hardly credible that such simplicity should be the accompaniment

of such acknowledged greatness. The consciousness of power was not there; the air of office was not there; there was no play of the lights or shades of rank, no study of effect in tone or bearing."

Add to this what Judge Story said from the bench, in receiving the resolutions of the Bar of the Supreme Court after Marshall's death: "But, above all, he was the ornament of human nature itself, in the beautiful illustrations which his life constantly presented, of its most attractive graces, and its most elevated attributes." [1]

Of Marshall's appearance on the bench we have a picture in one of Story's letters from Washington, while he was at the bar. He is writing in 1808, the year after the Burr trial. "Marshall," he says, "is of a tall, slender figure, not graceful or imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are in general harmonious. His manners are plain, yet dignified; and an unaffected modesty diffuses itself through all

[1] 10 Peters's Reports, vii.

his actions. His dress is very simple, yet neat; his language chaste, but hardly elegant; it does not flow rapidly, but it seldom wants precision. In conversation he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling. . . . I love his laugh, — it is too hearty for an intriguer, — and his good temper and unwearied patience are equally agreeable on the bench and in the study."

Daniel Webster, in 1814, while he was a member of Congress from New Hampshire, wrote to his brother: "There is no man in the court that strikes me like Marshall. He is a plain man, looking very much like Colonel Adams, and about three inches taller. I have never seen a man of whose intellect I had a higher opinion."

In the year 1808, when Judge Story wrote what has just been quoted, Marshall was sketched in chalk by St. Mémin. It is a beautiful portrait, which its present owner, Mr. Thomas Marshall Smith, of Baltimore, John Marshall's great-grandson, has now generously allowed to be copied for the use of the public.

It was in 1830 that Chester Harding painted for the Boston Athenæum the full-length portrait, of which, a little later, he made the replica, afterwards purchased, by subscription, for the Harvard Law School. "I consider it," says Harding, "a good picture.[1] I had great pleasure in painting *the whole* of such a man. . . . When I was ready to draw the figure into his picture, I asked him, in order to save time, to come to my room in the evening. . . . An evening was appointed; but he could not come until after the 'consultation,' which lasts until about eight o'clock." It will be remembered that the judges, at that time, used to lodge together, in one house. "It was a warm evening," continues Harding, "and I was standing on my steps waiting for him, when he soon made his appearance, but, to my surprise, without a hat. I showed him into my studio, and stepped

[1] The half-length, sitting portrait of Marshall, in the dining-hall at Cambridge, was painted by Harding, in 1828, for the Chief Justice himself; and by him given to Judge Story, "to be preserved, when I shall sleep with my fathers, as a testimonial of sincere and affectionate friendship." Story bequeathed it to the college.

back to fasten the front door, when I encountered [several gentlemen] who knew the judge very well. They had seen him passing by their hotel in his hatless condition, and with long strides, as if in great haste, and had followed, curious to know the cause of such a strange appearance. . . . He said that the consultation lasted longer than he expected, and he hurried off as quickly as possible to keep his appointment with me." He declined the offer of a hat on his return: "Oh no, it is a warm night; I shall not need one."

A good many artists tried their hands on the Chief Justice, and with every sort of result. Some depicted a dull and wooden person, some a worthy but feeble one. Other portraits, commended for their likeness to the original, differ much in what they represent.[1]

[1] See an interesting article by Mr. Justice Bradley, of the Supreme Court of the United States, on portraits of Marshall, in the *Century Magazine* for September, 1889, (vol. 38, page 778.) A portrait by Jarvis, valued as a work of art and as a good likeness, is in the possession of Mr. Justice Gray. Mr. Justice Bradley appears to be

In the written descriptions of him, also, one needs to compare several before he can feel much assurance of the true image. In an anonymous account of him, preserved in Van Santvoord's "Lives of the Chief Justices,"[1] the reader seems to perceive the humorous exaggerations of an entertaining and practiced writer, but, taken with due allowance, the description may well be preserved.

"As to face and figure," says this account, "nature had been equally little at pains to stamp, with any princely effigy of what pleases, the virgin gold of which she had composed his head and heart. Except that his countenance was thoughtful and benignant, it had nothing about it that would have commanded a second look. Separately his features were but indifferent, jointly they were no more than commonplace. Then as to stature, shape, and carriage, there was

wrong in saying that there is a full-length of Marshall at Washington and Lee University. There are two portraits of him there, but, as I am assured, no full-length.

[1] P. 363, n.

nothing in him that was not the opposite of commanding or prepossessing; he was tall, yet his height was without the look of either strength or lightness, and gave neither dignity nor grace. His body seemed as ill as his mind well compacted; he not only was without proportion, but of members singularly knit, that dangled from each other and looked half dislocated. Habitually he dressed very carelessly; in the garb, I should not dare to say in the mode, of the last century. You would have thought he had on the old clothes of a former generation, not made for him by even some superannuated tailor of the period, but gotten from the wardrobe of some antiquated slop-shop of second-hand raiment. Shapeless as he was, he would probably have defied all fitting, by whatever skill of the shears; judge then how the vestments of an age when, apparently, coats and breeches were cut for nobody in particular, and waistcoats were almost dressing gowns, sat upon him."

Such a statement should be supplemented by what one of his family said of him: "The

descriptions of his dress are greatly exaggerated; he was regardless of style and fashion, but all those who knew him best testified to the extreme neatness of his attire." [1]

[1] Mrs. Hardy, quoting her grandmother, in 8 *Green Bag*, 484.

CHAPTER VIII

HIS LAST DAYS

THE year 1831 was a sad one for Marshall. The greatest apprehensions were felt for his health. "Wirt," says John Quincy Adams in his diary, on February 13, 1831, "spoke to me, also, in deep concern and alarm at the state of Chief Justice Marshall's health." In the autumn he went to Philadelphia to undergo the torture of the operation of lithotomy, before the days of ether. It was the last operation performed by the distinguished surgeon, Dr. Physick. Another eminent surgeon, who assisted him, Dr. Randall, has given an account of this occasion, in which he says: —

"It will be readily admitted that, in consequence of Judge Marshall's very advanced age, the hazard attending the operation, however skillfully performed, was considerably increased. I consider it but an act of

justice, due to the memory of that great and good man, to state that, in my opinion, his recovery was in a great degree owing to his extraordinary self-possession, and to the calm and philosophical views which he took of his case, and the various circumstances attending it.

"It fell to my lot to make the necessary preparations. In the discharge of this duty I visited him on the morning of the day fixed on for the operation, two hours previously to that at which it was to be performed. Upon entering his room I found him engaged in eating his breakfast. He received me with a pleasant smile upon his countenance, and said: 'Well, doctor, you find me taking breakfast, and I assure you I have had a good one. I thought it very probable that this might be my last chance, and therefore I determined to enjoy it and eat heartily.' I expressed the great pleasure which I felt at seeing him so cheerful, and said that I hoped all would soon be happily over. He replied to this that he did not feel the least anxiety or uneasiness

respecting the operation or its results. He said that he had not the slightest desire to live, laboring under the sufferings to which he was then subjected; that he was perfectly ready to take all the chances of an operation, and he knew there were many against him; and that if he could be relieved by it he was willing to live out his appointed time, but if not, would rather die than hold existence accompanied with the pain and misery which he then endured.

"After he finished his breakfast I administered to him some medicine; he then inquired at what hour the operation would be performed. I mentioned the hour of eleven. He said, 'Very well, do you wish me now for any other purpose, or may I lie down and go to sleep?' I was a good deal surprised at this question, but told him that if he could sleep it would be very desirable. He immediately placed himself upon the bed, and fell into a profound sleep, and continued so until I was obliged to rouse him in order to undergo the operation. He exhibited the same fortitude, scarcely uttering a murmur,

throughout the whole procedure, which, from the peculiar nature of his complaint, was necessarily tedious."

From the patient over a thousand calculi were taken. He had a perfect recovery; nor did the disorder ever return.[1]

On Christmas Day of that year, as I have said, his wife died, the object of his tenderest affection ever since he had first seen her, more than fifty years before. The day before she died, she hung about his neck a locket with some of her hair. He wore it always, night and day; and, by his order, it was the last thing removed from his body when he died.[2]

It was at this period, in 1831 and 1832,

[1] My friend Dr. Horace Howard Furness, of Philadelphia, writes (and allows me to quote): "I remember hearing my father say that Dr. Physick told him, just after that operation of lithotomy, that he had 'washed the judge out as clean as a plate,' and that he went on to say that after the operation the strictest quiet was enjoined, not a muscle was to be moved; but what was his alarm on his next visit to see Judge Marshall sitting up in bed with paper and pencil on his knees, writing to his wife!"

[2] Marion Harland, *Old Colonial Homesteads*, 98.

that Inman's fine portrait of him, now hanging in the rooms of the Law Association of Philadelphia, was painted, for the bar of that city. A replica which Marshall himself bought for his daughter, is on the walls of the state library in Richmond. This portrait is regarded as the best of those painted in his later life. Certainly it best answers the description of him by an English traveler, who, seeing him often in the spring of 1835, remarked that "the venerable dignity of his appearance would not suffer in comparison with that of the most respected and distinguished-looking peer in the British House of Lords." [1]

After his recovery, in 1831, Marshall seems to have been in good health down to the early part of 1835. Then, we are told, he suffered "severe contusions" in the stage-coach in returning from Washington.[2]

[1] *Travels in North America*, by Hon. Charles Augustus Murray, — "the late Sir Charles Murray, at one time Master of the Household to the Queen, who, as a young man, was attached to the British Legation at Washington." — *The Spectator*, February 9, 1901, p. 199.

[2] Many a "severe contusion" must he have suffered in

His health now rapidly declined. He went again for relief to Philadelphia, and died there on July 6, 1835, of a serious disorder of the liver. He had missed from his bedside his oldest son, Thomas, for whom he had been asking. Upon the gravestone of that son, behind the old house at Oakhill, you may read the pathetic tragedy, withheld from his father, that accounts for this absence. While hastening to Philadelphia, at the end of June, he was passing through the streets of Baltimore, in the midst of a tempest, and was killed by the falling of a chimney in the storm.

The great Chief Justice was carried home with every demonstration of respect and reverence. He was buried by the side of

those primitive days, from upsets and joltings, in driving every year between Richmond and Washington, some 120 miles each way; from Richmond to Raleigh and back, in attending his North Carolina circuit, about 175 miles each way; and between Richmond and Oakhill, his country place, every summer, about 100 miles each way. For instance, in 1812, Cranch, the reporter, remarks that Marshall was not present at the beginning of the term, as he "received an injury by the oversetting of the stage-coach on his journey from Richmond."

his wife, in the Shockoe Hill Cemetery in Richmond. There, upon horizontal tablets, are two inscriptions of affecting simplicity, both written by himself. The first runs thus: "John Marshall, Son of Thomas and Mary Marshall, was born the 24th of September, 1755. Intermarried with Mary Willis Ambler, the 3d of January, 1783. Departed this life the [6th] day of July, 1835." The second, thus: "Sacred to the memory of Mrs. Mary Willis Marshall, Consort of John Marshall, Born the 13th of March, 1766. Departed this life the 25th of December, 1831. This stone is devoted to her memory by him who best knew her worth, And most deplores her loss."

Among the tributes to Chief Justice Marshall which were made in the months that followed his death, and in later times, nothing finer has been said than the heartfelt expression of the bar of his own circuit, at Richmond, in November, 1835. The resolutions of Mr. B. Watkins Leigh, unanimously adopted, recalled "the memory of

the venerable judge" who had presided there for more than thirty-four years "with such remarkable diligence in office, that until he was disabled by the disease which removed him from life, he was never known to be absent from the bench, during term time, even for a day, — with such indulgence to counsel and suitors that everybody's convenience was consulted but his own, — with a dignity, sustained without effort, and apparently without care to sustain it, to which all men were solicitous to pay due respect, — with such profound sagacity, such quick penetration, such acuteness, clearness, strength, and comprehension of mind, that in his hands the most complicated causes were plain, the weightiest and most difficult, easy and light, — with such striking impartiality and justice, and a judgment so sure, as to inspire universal confidence, so that few appeals were ever taken from his decisions, during his long administration of justice in this court, and those only in cases where he himself expressed doubt, — with such modesty that he seemed wholly unconscious of

his own gigantic powers, — with such equanimity, such benignity of temper, such amenity of manners, that not only none of the judges who sat with him on the bench, but no member of the bar, no officer of the court, no juror, no witness, no suitor, in a single instance, ever found or imagined, in anything said or done, or omitted by him, the slightest cause of offense.

"His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful, disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments, his kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence toward all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that highly as he was respected, he had the rare happiness to be yet more

beloved. He was, indeed, a bright example of the true wisdom which consists in the union of the greatest ability and the greatest virtue."

On the west side of the Capitol at Washington, midway between the staircases that ascend from the garden to the great building, and a little in advance, there is a colossal bronze figure of Marshall by the sculptor Story, the son of the great man's colleague and friend, — placed there in 1884. It is a very noble work of art, worthy of the subject and the place. The Chief Justice is sitting, clothed in his judicial robe, in the easy attitude of one engaged in expounding a subject of which he is master. The figure is leaning back in the chair with the head slightly inclining forward; the right arm rests on the arm of the chair, with the hand open and extended; the left hand, holding a scroll, lies easily on the other arm of the chair. The crossed legs are covered by the gown, while low shoes and buckles, and hair gathered in a queue, speak of life-

long habits. The solid and beautiful head, and the grave and collected dignity of the features and the whole composition are very noble, satisfactory, and ideally true.

The figure, standing, would be ten feet high. It sits seven feet high, and is raised upon a suitable pedestal, decorated with marble bas-reliefs of classical designs. These, if the truth were told, might well be spared, but the statue itself will fitly commemorate for many ages one of the greatest, noblest and most engaging characters in American history.

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